DOCUMENT RESUME

ED 202 124 EA 013 574

TITLE	Title IX: Parity of Coaches' Salaries for Male and Female Athletic Teams.
INSTITUTION	National Education Association, Washington, D.C.
PUB DATE	79
NOTE	51p.
AVAILABLE FROM	Publications Dept., National Education Assn., 1201 16th St., NW, Washington, DC 20036 ($4.95).
EDRS PRICE	MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS	*Athletic Coaches; Civil Rights; Compliance (Legal); Contracts; Elementary Secondary Education; Employment Practices; Federal Legislation; Federal Regulation; Negotiation Agreements; *Salaries; *Salary Wage Differentials; Sex Discrimination; Teacher Attitudes
IDENTIFIERS	*Equal Pay Act 1963; *Title IX Education Amendments 1972

ABSTRACT

A study by the National Education Association (NEA) of the existing literature, teacher opinion polls, federal legislation and regulations, state salary schedules, and collective bargaining agreements revealed important information concerning the differences in salaries in the late 1970s for coaches of male and female athletic teams in the public schools. Analysis of contracts showed that salaries were not generally equal in the 1977-78 school year, but that the percentage of contracts with equal salaries was higher than in 1975-76. Teachers polled during the period felt efforts to comply with the provisions of Title IX of the Education Amendments of 1972 were inadequate. The researchers determined that the Equal Pay Act of 1963 is the most appropriate and effective tool to use in resolving equal pay issues involving sex discrimination. The data available were not sufficient to answer questions concerning equality of pay for extra work by coaches. As a result of the study, the researchers developed several recommendations for actions to be taken by the NEA involving continued monitoring of federal agencies, establishing of a salary schedule data base, analyzing contracts annually, encouraging use of the Equal Pay Act, and supporting enforcement of Title IX provisions. (PGD)

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Title IX: Coaching Salaries in Athletics

National Education Association Research

A National Education Association Publication

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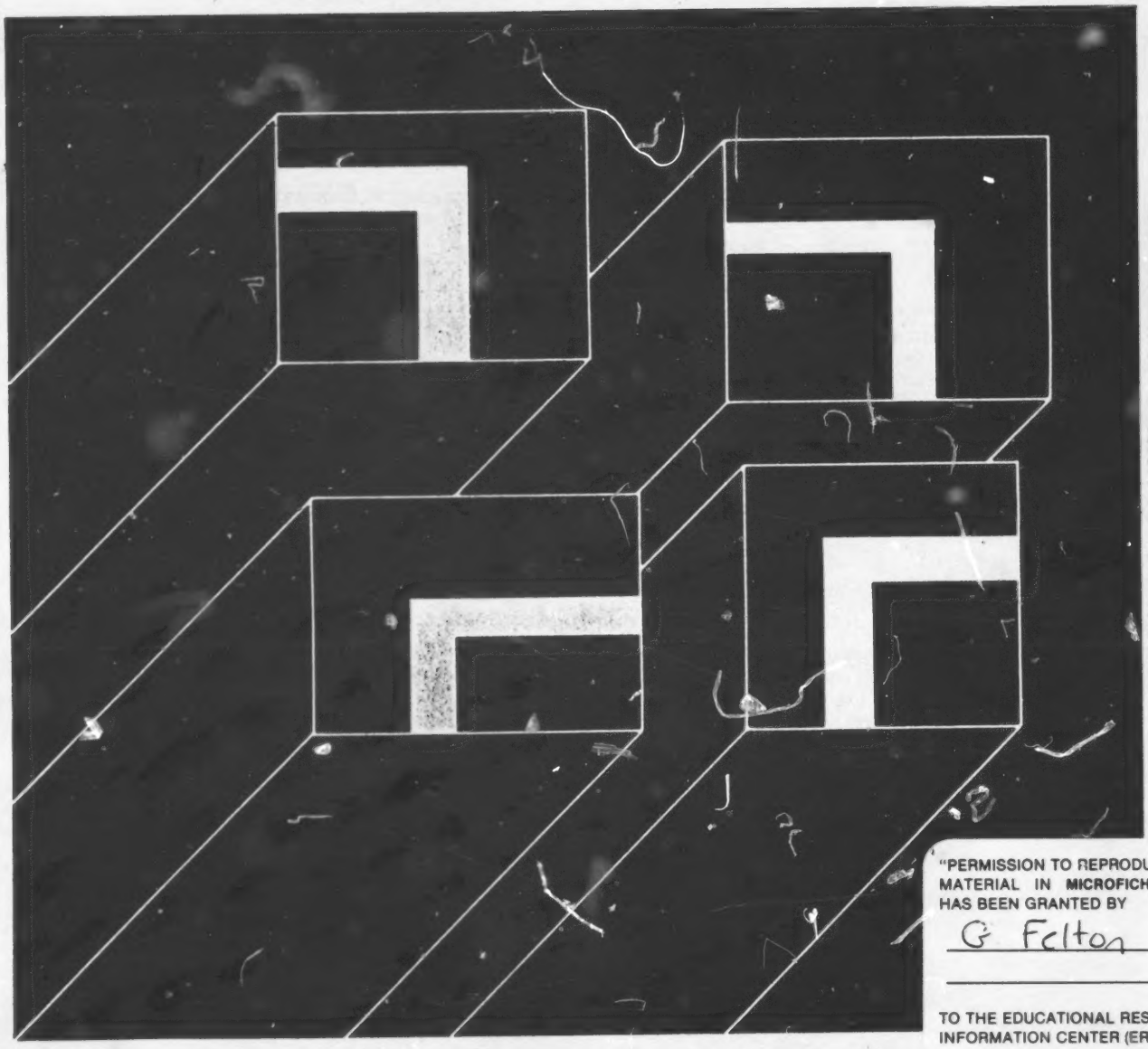

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Title IX:

Parity of Coaches' Salaries for Male and Female Athletic Teams

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TITLE IX: PARITY OF COACHES' SALARIES FOR MALE AND FEMALE ATHLETIC TEAMS

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FOREWORD

Title IX: Parity of Coaches' Salaries for Male and Female Athletic Teams reports the results of a year-long study mandated by the NEA Board of Directors. The study consisted of reviewing internal and external organizational sources for data and information. NEA's General Counsel, Government Relations, and Teacher Rights areas were extremely helpful in providing guidance and resources. External organizations that supported this effort were the American Alliance for Health, Physical Education, Recreation, and Dance; Resource Center on Sex Equity (Council of Chief State School Officers); American Council on Education; and the President's Advisory Council for Women.

The overall purpose of the study was to examine and report the status of Title IX as it applies to physical education. The ultimate, long-term objective of this effort is to help support and influence the development of physical education and athletic programs for girls and women in education.

The NEA's intention is not to support women's and girls' programs at the expense of men's and boys' physical education and athletic programs. The effort is directed toward improving women's and girl's physical education and athletic programs to a level *equal* to the men's and boys' programs. Included in this effort is the area of equal pay for equal work. This report focuses on the issue of parity of coaches' salaries for male and female athletic teams.

Special acknowledgements for a year-long effort on this study go to the following NEA Research staff:

- Alicia de la Torre, for her review of the literature and the state salary study.
- Bernard Bartholomew, for his analyses and report on the 1975-76 and 1977-78 Nationwide Teacher Opinion Polls.
- Peg Jones, for her historical review of the Title IX regulations.
- Joe Falzon, for his interpretation of the negotiated contract file.
- Suzanne Gardner, for her study, analysis, and write-up of the negotiated contract analysis section of this report.
- Don Walker, for his knowledge of the Equal Pay Act and its value in helping to bring parity to coaches' salaries.
- Nancy Greenberg, for her write-up of selected portions of the teacher opinion polls and the overall editing of the report.
- Bill Dresser and Helen Stone, who typeset the final manuscript through numerous drafts in order to have the most current information.

Special acknowledgement is made to R. Lawrence Dessem for his "Sex Discrimination in Coaching" paper, which appears in Appendix B.

June 1979

Frank W. Kovacs
Director of Research

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HIGHLIGHTS OF THE STUDY

NEA Research investigated, studied, and analyzed existing literature, opinion polls, federal legislation, agency regulations, and negotiated collective bargaining contracts to determine the status of coaches' salaries for male and female athletic teams. The results of the study produced the following conclusions.

- Results of the contract analyses produced the conclusion that coaching salaries for male and female teams are in general not equal. In the 1977-78 school year, parity in coaching salaries for male and female teams existed in 28 percent of the districts, while 50 percent had unequal salaries. No information was available for 22 percent of the contracts.
- An historical study of changes in coaching salaries from 1975-76 to 1977-78 produced 148 matched contracts for school districts. The number of contracts with parity in coaching salaries increased 31 percent between 1975-76 and 1977-78. The significant number (63 percent) of unmatched contracts prevented any meaningful generalization about the changing status of pay for coaching.
- The first four years of Title IX's existence have not produced equity in coaching salaries for male and female athletic teams. A total of 2,674 Title IX complaints were received from 1974 through 1978. Of these complaints, 64 percent had been resolved and 36 percent were pending.
- The most effective method available to resolve an equal pay issue with regard to sex discrimination is the Equal Pay Act. In fiscal 1977-78 alone, 1,862 equal pay violations were found in education and over $2.4 million in back-pay awards were made to educators. When this Equal Pay Act record of back-pay awards is compared to Title IX's success in achieving equal pay, there is little doubt that the Equal Pay Act is the most appropriate approach to bring about parity in coaches' salaries.
- The existing data and information gathered and maintained about extra pay for extra work by sex in athletics are inadequate to reach state-by-state or national conclusions concerning parity in male and female coaching salaries. Only 12 states reported extra-pay-for-extra-work information, and only five states have established criteria.
- Teacher opinion poll data from 1975-76 and 1978-79 reveal that Title IX compliance efforts have quite a distance to go before success will be achieved. A greater percentage of female teachers than male teachers believe there is discrimination in some school systems' programs and practices. Discrimination is also more likely to be seen against female teachers or students than against male teachers or students. Teachers perceive that the two most likely areas for discrimination to exist against female teachers in school systems are in promotion/employment in supervisory and/or administrative positions and in the pay for comparable extra duties. Finally, teachers perceive that female students are more likely to be discriminated against in extracurricular sports and in physical education.

Recommendations

The negotiated contract analysis and the study of available information suggest the following recommendations.

The National Education Association should–

- Continue to monitor all federal agencies that have responsibility for the administration of Title IX, Equal Pay Act, and Title VII of the Civil Rights Act of 1964.
- Develop, in cooperation with state and local affiliates, a data base of salary schedules on extra pay for extra work.
- Analyze negotiated contracts annually to chart the progress made on achieving parity of coaches' salaries for male and female athletic teams.
- Encourage state and local affiliates to process sex discrimination wage violations associated with equal work through the U.S. Department of Labor's Wage and Hour Division under the Equal Pay Act.
- Maintain efforts to encourage the enforcement of Title IX regulations in elementary and secondary schools and higher education.

After the initial release of this report, the National Education Association joined feminist and other organizations in charging the Secretary of Health, Education, and Welfare and the director of HEW's Office for Civil Rights with contempt of court for refusing to enforce Title IX prohibitions against sex discrimination in schools. Plaintiffs charge in the July 10, 1979, court action that the Secretary has ordered a total halt to the enforcement of Title IX in the area of intercollegiate athletics in direct violation of a court order issued in December 1977 requiring HEW to enforce all Title IX issues of the 1972 Education Amendments Act under strict timeframes.

Other national organizations bringing the original lawsuit and now asking for a contempt of court citation are the Women's Equity Action League, National Organization for Women, National Student Association, Federation of Organizations for Professional Women, and Association for Women in Science.

INTRODUCTION

Title IX: Parity of Coaches' Salaries for Male and Female Athletic Teams is a status report on sex discrimination in physical education and, more directly, on salaries paid for coaching male and female athletic teams. The report is a direct result of the NEA Board of Directors' July 1978 action to study and report on the status of Title IX as it applies to physical education. The implementation of Title IX during FY 1978-79 was hampered by many events, which are discussed in greater detail in various sections of the appendices. These events, however, forced the scope of this study to be restricted to the equal-pay-for-equal-work aspects of coaching male and female athletic teams.

This decision was made because of the uncertain state of the 1978 Policy Interpretation on Intercollegiate Athletics, the lack of detailed data on enforcement and compliance from HEW's Office for Civil Rights, and the current legal issues relating to the status of the application of Title IX to employment.

In addition, many sources of related information surveyed, whether written or in interview form, decried the state of knowledge related specifically to coaching and coaching salaries as points of contention in athletics. For all of these reasons, the scope of this report was narrowed.

NEA Research investigated and studied existing literature, state salary schedules, teacher opinion polls, federal legislation and regulations, and negotiated collective bargaining agreements in compiling this report.

The report is divided into five sections: Introduction; Analysis of Negotiated Contracts; Title IX: Employment and Wages; Recommendations; and Appendices.

Background

The National Education Association has a long-standing record of affirmative response to antidiscrimination legislation affecting education programs and conditions of employment in education. As a part of this support, the NEA has resolved that "all persons, regardless of sex, be given equal opportunity for employment, promotion, compensation, and leadership in all activities."[1] That record, coupled with strong advocacy of the concept of equal pay for equal work, underlies NEA's continuing interest in monitoring progress in the implementation of Title IX of the Higher Education Amendments of 1972. This report represents one effort to describe the current status of an important but limited aspect of coverage under Title IX—issues of employment and compensation in the area of coaching in athletics or sports in the public schools. While other aspects of progress will be reviewed, employment and compensation in coaching are stressed.[2]

[1] *NEA Handbook, 1978-79*, p. 237.

[2] See Appendix C for an historical review of Title IX.

Originally, it was anticipated that 1979 would be a most appropriate year for updating information on the possible effects of Title IX in eliminating sex discrimination across the programmatic and personnel areas in physical education and athletics or sports. It was thought that coverage might include all levels of education from elementary through secondary and postsecondary institutions. This was a logical expectation because of the compliance mandates included in the Title IX regulation for implementation, which was issued by the U.S. Department of Health, Education, and Welfare, Office for Civil Rights, on July 21, 1975. Mandates for coming into compliance with Title IX were to become effective over a three-year period. Elementary education was given a compliance deadline of July 21, 1976. Secondary and postsecondary institutions of education were expected to come into compliance by July 21, 1978. Therefore, the academic or school year 1978-79 was the first time that the cumulative effects of Title IX might reasonably be considered to become more visible.

However, with respect to physical education and most especially athletics, much has occurred that has resulted in a modification of expectations for compliance. Most notably, the postsecondary levels—including two- and four-year colleges and universities—and secondary institutions have been given some reprieves while additional policy interpretations are being developed during 1978-79. These and other unanticipated delays and barriers to the implementation of the compliance requirements of Title IX in athletics forced a narrowing of the major focus and coverage of this report to equal pay for equal work.

ANALYSIS OF NEGOTIATED CONTRACTS

Title IX of the Education Amendments of 1972 is the most recent federal legislation prohibiting sex discrimination. The Title IX regulation of 1972 contains substantive provisions applicable to coverage for students and personnel in all institutions that receive federal financial assistance.

Prohibition of sex discrimination as covered by Title IX is consistent with the policy of the National Education Association, i.e., commitment to equality of opportunity for employment, promotion, compensation, and leadership in all activities. Discriminatory practices have occurred in the past, and this discrimination has generated considerable public concern.

At the outset, a distinction must be made between physical education and athletics. *Physical education* encompasses those activities that are part of the school curriculum and that are generally held during regular school hours. *Athletics* refers to activities for which participation is based on the children's level of skill and in which participation generally occurs apart from the normally scheduled classes during the school day. Coaching salaries considered in this report are those paid for athletic activities. The focus of this study—coaching salaries—is but a small part of the personnel coverage in Title IX.

This analysis—requested by NEA's Board of Directors—represents a first attempt to examine systematically school districts' contracts to determine if there is parity in pay for coaching male and female athletic teams. The research question posed for this study was, *Are salaries equivalent for coaches of male and female athletic teams?*

The Sample

As part of NEA Research's support for the ongoing Affiliate Services Negotiation program, a sample of school districts' negotiated contracts is gathered annually. These contracts are coded and stored in the computer for use at the national level and by states in support of the local affiliates' negotiation activities. In addition, NEA Research analyzes selected areas (e.g., health benefits, dental coverage) to determine the state of the art or to investigate trends in bargained contracts.

The NEA file of negotiated group contracts, based on a sample of 1,001 school districts, is the most comprehensive national collection of data related to public school coaching salaries. *A negotiated group contract*, as defined by NEA criteria, is a negotiated agreement that contains at least one provision relative to wages, hours, or terms and conditions of employment.

The process of sampling to create the current public school district file consisted of the following steps:

- A sample of 1,001 school districts was selected from the estimated 16,000 operating school districts in the 1975-76 school year. The criterion used to select the 1,001 school districts was size. School districts with over 12,000 students and school districts under 12,000 students were divided into two groups.[3]
- All school districts with over 12,000 students were included in the sample. In 1975-76 there were 565 school districts with over 12,000 students.
- School districts with less than 12,000 students were selected randomly to ensure that all districts had an opportunity to be included in the sample. A number between 1 and 35 was randomly selected, and then a systematic selection of every thirty-fifth school district was accomplished until 436 districts had been selected.
- NEA Research collects the negotiated contracts from the selected school districts annually. The same school districts are used from year to year in order to monitor changes and chart improvement or retrenchment in the contracts.

The Procedure

The procedure used to study the contracts to determine the status of coaching pay consisted of the following three-step process:

Step 1: Review of the 1977-78 sample. The 1977-78 sample of negotiated contracts on file at the NEA totalled 403.[4] There were 276 contracts from school districts with pupil enrollment over 12,000 and 127 contracts from school districts with pupil enrollment under 12,000. These two sets of negotiated contracts for school year 1977-78 were used as the basic sample for the analysis.

Step 2: Review of the 1975-76 sample. The 403 negotiated contracts gathered in 1977-78 were used as the sample for comparative analysis of the 1975-76 sample. This process consisted of matching school district contracts for 1975-76 and 1977-78.

The net result of this matching produced 148 contracts for which a before (school year 1975-76) and after (school year 1977-78) comparison on coaching salaries could be made. *The inability to match the remaining 255 prevents any generalizations or inferences about school districts not included in the study.* Simply stated, the findings in this study are restricted to the 148 matched school districts for the school years 1975-76 and 1977-78, for which the analysis was conducted.

Exactly 105 contracts from school districts with over 12,000 students and 43 from school districts with under 12,000 students were compared. The distribution of the sample appears in Table 1.

---

[3]School districts with over 12,000 students include districts with 12,000 or more students; under 12,000 include districts with 11,999 or fewer students.

[4]This left 598 of the 1,001 base-year sample not collected in 1977-78. An analysis of how many of the 598 school districts were multiple-year contracts or nonbargaining school districts was not accomplished.

TABLE 1.–SUMMARY DESCRIPTION OF SAMPLE SIZE FOR NEGOTIATED CONTRACTS INCLUDED IN THE ANALYSIS

School district size	Total number of school districts	Sample size, 1975-76	Number of respondents; sample districts with 1977-78 contracts	Number of districts with comparative contracts, 1975-76 and 1977-78
1	2	3	4	5
Pupil enrollment of 12,000 or more	565	565	276	105
Pupil enrollment of less than 12,000	15,499	436	127	43
TOTAL	16,054[a]	1,001	403	148

[a]NEA Research. *Estimates of School Systems, 1975-76 by State, Grade Level, and Stratum.* December 1976.

Step 3: Classification of contracts. The 403 1977-78 contracts and the 148 matched contracts were divided into two classifications: one by school district size (over or under 12,000 pupils) and the second by salary schedules. The first classification by school district size was fairly straightforward, with the 1975-76 size of the school district used as the classification standard.

The second classification required a more detailed analysis of the contracts. The three categories used to classify salary schedules for male and female athletic teams were contracts with equivalent salary schedules, contracts with unequal salary schedules, and contracts with no coaching salary data specified. This last category was included because the information in the contracts was not available for a variety of reasons, such as renegotiation provisions, no extracurricular offerings, no salary listings, and pending study committee recommendations.

The Results of the Analysis

To analyze the 403 1977-78 contracts and the 148 matched contracts in regard to the research question, *Are salaries equivalent for coaches of male and female athletic teams?*, answers to the following related research questions also had to be found to provide additional information and insight into Title IX's progress:

- Are 1977-78 salaries equivalent for coaches of male and female athletic teams in school districts with pupil enrollments over and under 12,000?
- Were salaries equivalent for the coaches of male and female athletic teams for the 1977-78 school year?
- Has there been a change in coaching salaries for male and female athletic teachers for the 148 matched contracts studied?

The operational definitions used to determine equivalency of male and female teams were identical, except for baseball and softball. These team sports were considered as equivalent since a preliminary review of the contracts revealed that a number of school districts have chosen to treat these team sports as equal.

Before answering the primary research study question, the three related questions were answered to help place the progress of Title IX expectations into an historical perspective. It should be noted that 1975 was the date of publication of the Title IX regulations, and the most recent contracts analyzed were from 1977-78.

The 1977-78 contracts were used to answer the first two related research questions about size and equivalent salaries. The 148 matched contracts were used to answer the third question about the change in salaries over time. Answers to these three questions were then used to reach a conclusion about the basic study question regarding equivalent salaries for male and female athletic teams.

Are 1977-78 salaries equivalent for coaches of male and female athletic teams in school districts with pupil enrollments over and under 12,000?

There were 403 contracts available for analysis for the 1977-78 school year. Exactly 276 contracts were from school districts with over 12,000 students and 127 contracts from districts with less than 12,000 students.

- *School Districts with Pupil Enrollment over 12,000*: There were 276 contracts in this group, 78 (28 percent) had equal salaries, 139 (50 percent) had unequal salaries, and 59 (22 percent) had contracts for which no coaching data were specified.
- *School Districts with Pupil Enrollment under 12,000:* There were 127 contracts in this group, 33 (26 percent) had equal salaries, 63 (50 percent) had unequal salaries, and 31 (24 percent) had contracts for which no coaching data were specified.

No differences were observed between the size of school districts' salaries for male and female athletic teams in the three categories studied. School districts with more than or less than a 12,000-pupil enrollment both had 50 percent of the contracts with unequal coaching salaries for male and female teams. The percent of contracts with equal salaries was about the same (28 percent vs. 26 percent) for districts over and under 12,000 students. A summary of the number and percent of the classified salaries by size of school district appears in Table 2.

TABLE 2.–SUMMARY OF THE NUMBER AND PERCENT OF 1977-78 CLASSIFIED SALARIES FOR COACHING MALE AND FEMALE TEAMS BY SIZE OF SCHOOL DISTRICT

Contract classification	Size of school district: Over 12,000 pupils		Under 12,000 pupils		Total	
	Number	Percent	Number	Percent	Number	Percent
1	2	3	4	5	6	7
With equal salaries	78	28	33	26	111	28
With unequal salaries	139	50	63	50	202	50
With no available information[a]	59	22	31	24	90	22
TOTAL	276	100	127	100	403	100

[a]Contracts classified in this category generally did not have a salary listing, were awaiting a study committee recommendation, or were in renegotiations.

Were salaries equivalent for coaches of male and female athletic teams for the 1977-78 school year?

To determine the answer to this question, 403 contracts were analyzed.

- *Contracts with Equal Salaries:* Of the 403 contracts analyzed, 111 (28 percent) had equal salaries for male and female coaching.
- *Contracts with Unequal Salaries:* One-half of the contracts analyzed had unequal salaries for male and female coaching.
- *Contracts with No Available Information:* Ninety (22 percent) of the 403 contracts did not have enough information to classify them into either one of the two categories.

The contract analysis revealed that there is a difference between salaries for male and female coaching. At least 50 percent of the contracts have unequal salaries and another 22 percent have insufficient information to determine the status of the salaries. Of the contracts studied, 28 percent had parity in salaries for coaching the same type of team.

Has there been a change in coaching salaries for male and female athletic teams for the 148 matched contracts studied?

To answer this, the 403 contracts gathered in school year 1977-78 had to be matched with contracts on file from school year 1975-76. It was possible to match 148 contracts with 1975-76. The 148 contracts were then categorized into four groups: Equal salaries before (1975-76) and after (1977-78); unequal salaries before (1975-76) and equal salaries after (1977-78); unequal salaries before and after; and no information before and after.

- The total number of contracts with equal salaries for 1977-78 school year was 111 of this amount; 46 were matched with the 1975-76 contracts.

Sixteen of the 46 contracts did not change between 1975-76 and 1977-78, while 30 changed from not being equal in 1975-76 to parity in 1977-78. This represented a 20 percent (30/148) change in the status of coaching salaries for the 148 matched contracts. Another way of viewing the change is that in 1975-76, 16 (11 percent) of 148 matched school district contracts had parity in coaching salaries and in 1977-78 the same school district contracts had parity in 46 (31 percent) of the same districts.

- A match could not be accomplished for 255 (63 percent) of the 403 school district contracts. This inability to analyze over 60 percent of the contracts prevents any conclusion about change in parity of coaching salaries for the interval studied.

Conclusion

Investigating the three related questions posed to help answer the basic question in this study led to the following conclusions.

- No difference in male and female coaching salaries exists among the 403 contracts analyzed for school districts with over and under a 12,000-pupil enrollment. The results of this contract analysis showed that–
  - Fifty percent of the contracts had unequal coaching salaries for male and female teams in school districts with over and under 12,000 pupils.
  - Twenty-eight percent in districts with over 12,000 students and 26 percent in districts with under 12,000 students had parity for coaching male and female teachers.
  - Twenty-two percent in districts with over 12,000 students and 24 percent in districts with under 12,000 students had contracts for which no coaching data were specified.

For 1977-78 parity in coaching salaries for male and female teams existed in 28 percent of the districts with over 12,000 students and 26 percent of the districts with under 12,000 students; however, in the large and small districts coaching salaries were unequal in 50 percent of the contracts. This fact, along with the 22 percent over 12,000 and 24 percent under 12,000 (with no coaching salary information), produces the conclusion that most of the contracts studied had unequal and/or unknown salaries for coaching male and female teams.

- There are more 1977-78 contracts with unequal salaries (50 percent) than with equal (28 percent) coaching salaries for male and female teams. Thus, coaching salaries in general tend to be unequal for male and female teams.
- An historical study of change in coaching salaries from 1975-76 to 1977-78 produced 148 matched contracts for school districts. However, no match was possible for 255 (63 percent) of the 403 school district contracts, which prevented any conclusion about the question posed. However, the 111 contracts for which parity existed on coaching salaries in 1977-78 represent a 31-percent increase over the 1975-76 contract year. Unfortunately, the inability to match most of the school district contracts for the two years studied prevents a meaningful interpretation of these findings.
- Criteria used to determine coaches' salaries were listed in nine of the 403 contracts analyzed, as follows:
  - Length of season.
  - Number of contests.
  - Number of assitant coaches.
  - Budget and equipment responsibility.
  - Number of participants.

- Experience or training necessary.
- Student injury risk.
- Pressures.
- Environmental working conditions.
- Travel supervision.
- Level of complexity.
- Preparation time.

The listing of the criteria prompted further investigation into the Equal Pay Act, which is administered by the U.S. Department of Labor. It was found that the Equal Pay Act's regulations compare jobs in terms of skill, effort, responsibility, and similar working conditions. These terms (except for working conditions) are defined as follows:

> *Skill* includes consideration of such factors as experience, training, education, and ability. . . . The efficiency of the employee's performance in the job is not in itself an appropriate factor to consider in evaluating skill.
>
> *Effort* is concerned with the measurement of the physical or mental exertion needed for the performance of a job. . . . The occasional or sporadic performance of an activity which may require extra physical or mental exertion is not alone sufficient to justify a finding of unequal effort.
>
> *Responsibility* is concerned with the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation.

Upon close examination of these standards for comparing requirements for equal pay, the salary criteria noted in some of the contracts were concluded to be at best questionable and at worst illegal under the EPA guidelines, which in turn led to the conclusion that the best way to achieve parity in coaching salaries for male and female teams is to use the Equal Pay Act.

The results of this study suggest that the most efficient vehicle for resolving coaching salary disputes is the Equal Pay Act. Several factors that contribute to the efficient resolution of complaints filed under the Equal Pay Act are as follows:

- Under discrimination complaints, such as Title IX, the *complainant* must prove discrimination. Under the Equal Pay Act, the burden of proof lies with the *employer.* See Appendix B.
- The procedures for processing Title IX complaints are still developing and changing, whereas procedures and personnel for filing under the Equal Pay Act are fully developed and stable.
- The U.S. Court of Appeals for the First Circuit has ruled that Title IX of the Education Amendments of 1972 does not cover employment.

Summary

The results of the contract analysis produced the conclusion that coaching salaries for male and female teams are, in general, not equal. When parity does not exist between coaching salaries for male and female teams, the most effective way to correct the situation is to file a complaint under the Equal Pay Act. In brief, this Act prohibits an employer from paying employees of one sex lower wages than those paid the opposite sex for equal work. It *does not* prohibit an employer from paying an employee of the *same* sex different pay for equal work.

Another major limitation of the Equal Pay Act is that violations must be made for matched pairs of opposite sexes in the same job (female basketball coaches, male basketball coaches). Therefore, aggressive efforts to implement Title IX should continue to remedy sex discrimination in the long run; and in those situations where an immediate remedy is needed, the Equal Pay Act should be used.

TITLE IX: EMPLOYMENT AND WAGES

Understanding the relationships between Title IX of the Higher Education Amendments of 1972 and other legislation governing employment is important to all affirmative responses to employment issues. Moreover, recent legal challenges to the employment provisions of Title IX make it imperative that people have broader knowledge of additional avenues of recourse in cases of possible sex discrimination in employment.

An extensive analysis of Title IX in context with other legislation is available in *Programs for Educational Equity: Schools and Affirmative Action* (see Bibliography). Only highlights of selected related legislation will be presented here, except for the Equal Pay Act of 1963, which is discussed in detail below.

Title IX. Title IX states, "No person—shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." Title IX is modeled after Title VII of the Civil Rights Act of 1964, which prohibits discrimination in education programs on the grounds of race, religion, or national origin. Title IX extends prohibition of discrimination on the basis of sex to employment policies and practices as well as education programs.

- Exemptions include religious institutions and military schools if their primary purpose is to train individuals for military service or the merchant marine.
- Complaints should be made to the Office for Civil Rights, U.S. Department of Health, Education, and Welfare, Washington, D.C. 20201, or the nearest HEW regional office.
  - Compliance enforcement can include deferring new funds pending a hearing by HEW, revoking current funds, and/or barring the institution from being eligible for future funds.
  - Referral to the U.S. Department of Justice to bring suit is a recourse available to HEW when such action is deemed appropriate.

Equal Pay Act of 1963. The Equal Pay Act of 1963 (as amended by the Education Amendments of 1972 of the Higher Education Act) prohibits sex discrimination in employees' salaries and fringe benefits. People working in the same institution under similar conditions in jobs demanding essentially equivalent skill, effort, and responsibility must be paid equally.

- Job titles and assignments need not be identical.
- *Bona fide* merit or seniority systems producing differential pay are permissible, as long as they do not discriminate on the grounds of sex.
- Complaints can be filed with the Wage and Hour Division, U.S. Department of Labor, Washington, D.C. 20210, or the nearest regional office of the Department of Labor.

Title VII of the Civil Rights Act of 1964. Title VII (as amended by the Equal Employment Opportunity Act of 1972) prohibits discrimination in employment on the basis of race, color, religion, national origin, or sex. Title VII guidelines, available from the Equal Employment Opportunity Commission (EEOC), specify which employment policies and practices are discriminatory.

Identifying Barriers to Progress: Highlights of Court Decisions[5]

The *National Law Journal* of May 28, 1979, reviewed the problems encountered by Section 901, (a) 20 USC 1681 (a) of Title IX. U.S. District and Circuit Courts have, according to author Jay S. Siegel, been virtually unanimous in their decisions that the Section does not confer authority on the Secretary of HEW to promulgate broad antidiscrimination regulations affecting the employment of school personnel. This is in response to U.S. Department of Justice arguments that Title IX was intended to cover the wages, hours, and working conditions for the recipients of federal funds.

In March 1979 a federal appeals court became the first appellate-level court to rule that HEW is without authority under Title IX to issue regulations barring discrimination in employment on the basis of sex. In the same case—argued before the U.S. Court of Appeals for the First Circuit—the court said that Title IX does not authorize HEW to require recipients of federal funds to treat pregnancy-related disability like any other for job-related purposes.

Final conclusions on the application of Title IX to employment probably will not be reached until (1) HEW and the Justice Department accept the current court decisions as final or (2) the issues are referred to the U.S. Supreme Court for a ruling. In the interim, action on employment discrimination under Title IX has not been suspended.

What is important to remember is that many of the employment discrimination issues are now being channeled to the EEOC and Labor's Wage and Hour Division.

Monitoring and Enforcement Efforts Within the Office for Civil Rights

Regulation: 1978. The status of the Title IX Intercollegiate Athletic Policy Interpretations still appears to be unsettled.

One source at the Office for Civil Rights reported no plans to issue a second regulation on Policy Interpretations for Secondary Athletics because "in the real world those for Intercollegiate Athletics will apply." However, another office seemed certain that a second set of policy interpretations for Title IX applying to secondary athletics would be forthcoming. Conflicting reports from the regulatory agency are not uncommon.

Other reports indicate that a second policy interpretation dealing with secondary athletics is expected. Only the future will tell.

Compliance and enforcement efforts. The Project on Equal Education Rights (PEER) of NOW's Legal Defense and Education Fund is monitoring the the compliance and enforcement efforts of the Office for Civil Rights.

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[5]NEA is indebted to Dr. Shirley McCune, director, Resource Center on Sex Equity (a project of the Council of Chief State School Officers) for her special technical assistance in compiling this portion of the report.

According to PEER's *Stalled at the Start* (see Bibliography), in the first four years of the law's existence, 871 complaints about elementary and secondary schools were filed with HEW. Of these, 13 were lost within the agency. The remaining 858 charged discrimination in institutions within all of the 50 states, as follows. (More than one type of violation was charged in many complaints.)

- 564 concerned employment.
- 351 involved athletics.
- 289 referred to access to courses.
- 187 addressed procedural requirements.
- 130 involved student rules.
- 64 miscellaneous.

In the first four years and three months of Title IX's existence, HEW investigated and resolved only 7 percent of the complaints. More than one-third of the cases filed in 1973 remained unresolved in 1976. Almost half of the cases on file as of June 1976 had been on HEW's rolls for at least one year. Only 1 complaint in 5 of the 858 filed in the four years since 1972 had been resolved by fall 1976.

To update the compliance and enforcement efforts of HEW's Office for Civil Rights, NEA contacted Robert Neilson, branch chief of OCR's Reports and Analysis. Although a categorization by type of Title IX complaint similar to that in the PEER report was not currently available, NEA did receive annual totals of Title IX complaints received and their disposition, as follows. A total of 2,674 Title IX complaints were received from 1974 through September 1978. Of these complaints, 64 percent (1,717) had been resolved and 36 percent (957) were pending.

Summary. Title IX has not been able to produce equity in coaching salaries for male and female athletic teams. Alternative enacted legislation was investigated to determine a more immediate and successful approach to establishing parity in coaches' salaries.

Equal Pay Act of 1963

The Equal Pay Act of 1963 (as amended in 1974) brings public employees under the Fair Labor Salary Act wage requirements by virtue of the Fourteenth Amendment. This was determined by two federal appeals courts and the Wage and Hour Division. The Equal Pay Act of 1963 comes under the Fair Labor Standards Act (FLSA) in the form of an amendment to the minimum-wage provisions.

In essence, the Act outlaws sex discrimination in wage rates. The equal-pay provisions prevent employers from discriminating between male and female employees in the amount of pay received for equal work performed under similar working conditions provided that the work requires equal skill, effort, and responsibility. The equal provision does not concern race or any other kind of discrimination, rather it is directed toward wage discrimination based on sex.

The statute does not indicate or favor one sex over the other. Historically, however, the application of the equal-pay-for-equal-work principle has involved situations in which women were hired to replace men during wartime or other periods of male employee shortages. Women who were assigned to replace men and perform substantially the same jobs were entitled to the same rate of pay.

The test of equality of the job is based on skill, effort, responsibility, and similar working conditions. NEA's *Sex Discrimination in Coaching* (see Appendix B) provides statute language and legal case citations on the equality test. Title IX and Title VII of the Civil Rights Act of 1964 are also discussed in the paper, which concludes that the Equal Pay Act provides one of the best possibilities for remedying sexually discriminatory coaching salaries.

The above analysis prompted an investigation of cases treated by Labor's Fair Labor Standards Division (FLSD). Information was provided as of November 1977. The Wage and Hour Division in Washington, D.C., does not routinely maintain statistics on coaching cases from all other equal pay cases; instead, the regional offices are the official custodians of the investigative records of equal pay cases.

The Office of the Solicitor, U.S. Department of Labor, provided case information for each of the regions as of November 1977. The address of the regional office, activity by the Wage and Hour Division, and activity by the Solicitor's office follow.

Activity by the Wage and Hour Division

Boston Region: *Assistant Regional Administrator*
Wage-Hour Division
JFK Federal Building
Boston, Massachusetts 02203

An upstate Connecticut high school raises the pay of the girls' outdoor track coach and assistant coach, girls' field hockey coach, and gymnastics coach by $1,000 per year and pays back wages of $1,161.

Five Massachusetts towns pay $9,715 in back wages to 22 female coaches and raise their salaries to those of the male coaches.

A Massachusetts school board pays $13,434 to 16 female matrons and four athletic coaches in a local high school and raises their salaries.

A Providence, R.I., regional school department pays $14,829 in back wages to 29 female coaches, teacher aides, and custodians and raises their salaries.

Two Massachusetts Boards of Education pay $8,402.33 in back wages to nine female coaches.

In three Connecticut high school districts, 11 female coaches receive $8,606 in back wages and pay increases.

New York Region: *Assistant Regional Administrator*
Wage-Hour Division
1515 Broadway
New York, New York 10036

At a Long Island university, a female tennis coach is raised to the salary level of a male tennis coach and back wages are paid.

Wage and Hour finds that two physical education teachers at a New York high school are due $3,400 in back wages. The high school refuses to comply, and the file is referred to the Regional Solicitor's Office for consideration of litigation.

Philadelphia Region: *Assistant Regional Administrator*
Wage-Hour Division
3535 Market Street
Philadelphia, Pennsylvania 19104

In a Pennsylvania school district, seven female coaches in tennis, softball, and basketball receive $1,333 in back wages and pay increases.

Atlanta Region: *Assistant Regional Administrator*
Wage-Hour Division
1371 Peachtree Street, N.E.
Atlanta, Georgia 30309

In a North Carolina city school system $1,300 in back wages is paid to female basketball and tennis coaches and their salaries raised.

Chicago Region: *Assistant Regional Administrator*
Wage-Hour Division
230 South Dearborn Street
Chicago, Illinois 60604

Dallas Region: *Assistant Regional Administrator*
Wage-Hour Division
555 Griffin Square Building
Dallas, Texas 75202

In a Louisiana public school system, 11 female physical education teachers and basketball coaches receive $5,470 in back wages and increases in salary.

Ten female basketball and track coaches in a Louisiana parish school system are paid $4,480 in back wages.

A Texas school district pays $670 to a high school coach and raises her pay.

Kansas City Region: *Assistant Regional Administrator*
Wage-Hour Division
911 Walnut Street
Kansas City, Missouri 64106

Denver Region: *Assistant Regional Administrator*
Wage-Hour Division
Federal Office Building
1961 Stout Street
Denver, Colorado 80202

San Francisco Region: *Assistant Regional Administrator*
Wage-Hour Division
450 Golden Gate Avenue
San Francisco, California 94102

In a San Francisco high school district, 13 female coaches and gym attendants receive $11,450 in back wages and increases in their pay.

Activity by the Solicitor's Office

Boston Region:

A lawsuit is pending against the Manchester, Connecticut, school district: $1,700 in back wages is sought for six female coaches.

A lawsuit is pending against the Board of Education for the town of Meriden, Connecticut: $9,200 in back wages is sought for seven female coaches.

A lawsuit is pending against the town of Wallingford, Connecticut: $12,000 in back wages is sought for 12 coaches.

In a consent decree, the city of Revere, Massachusetts, has raised the salary of one female basketball coach and paid her $950 in back wages.

In a consent decree, the town of Hanover, Massachusetts, raised the salaries of three female coaches and paid them $2,372 in back wages.

Both the city of Brockton, Massachusetts, and the town of Seekonk, Massachusetts, have consented to judgments in suits filed against them. Eight female coaches received $5,925 in back wages and increases in pay.

By consent decree the town of Cumberland, Rhode Island, has raised the salary of four female coaches and paid $18,064 in back wages to the coaches and to five female matrons.

Violations have been charged against high schools in Massachusetts, Connecticut, and Rhode Island involving 21 female coaches. Back wages of $19,824 are estimated.

New York Region:

A case against the Ocean Side (New Jersey) Free School District was settled with a stipulation of dismissal and the payment of $21,000 to several female basketball, hockey, and softball coaches.

A case against the Regional Board of Education in East Rutherford, New Jersey, was settled with a consent judgment and the payment of $800 in back wages to one female coach.

A case against the township of Mahwah, New Jersey, was settled with a consent judgment and the payment of $2,727 in back wages to two female coaches.

A case against the Hunterton (New Jersey) Central Board of Education was settled with a consent judgment and the payment of $2,200 in back wages to three female high school coaches.

Prelitigation settlement was reached with a New Jersey Board of Education through payment of $2,400 in back wages and pay increases to two female coaches.

Litigation involving female coaches is being considered against several other New Jersey school districts.

Philadelphia Region:

In a 1974 decision, the federal district court for the district of Delaware found equal-pay violations between male and female high school teacher/coaches in *Brennan v. Woodbridge School District,* 8 E.P.D. ¶5719 (D. Del. 1974). The female received $106 in back wages.

Chicago Region:

A lawsuit against Grand Haven Board of Education in Michigan was settled with the payment of $640 in back wages to four coaches.

A lawsuit against Cleveland Heights-University Heights Board of Education in Cleveland was settled with the payment of $3,100 to 14 coaches, and wage increases of from $180 to $235 per month.

A lawsuit against Michigan Township Schools was settled by the payment of $3,500 to 10 teacher/coaches for back wage increases. A consent judgment was filed.

Litigation is being considered against a Michigan school system involving $15,000 in back wages to female teacher/coaches.

San Francisco Region:

Usery v. Washoe County School District was settled by the payment of $2,000 in back wages to six teacher/coaches.

Enforcement

Labor's Wage and Hour Division is charged with the administration of the Fair Labor Standards Act, including the equal pay provisions. Either upon receipt of a specific complaint from an individual or as a part of a general wage-hour investigation, authorized representatives may gather data regarding the wages, hours, and other conditions and practices of employment. Representatives may inspect premises and records, transcribe records, and interview employees. Employers have no right to resist these investigations on the contention that they are not subject to the FLSA. If an equal pay violation is discovered, investigators will advise employers regarding necessary changes to achieve and maintain compliance with the law.

In fiscal 1977-78, 1,862 equal pay violations were found in education, with $2,409,252 in back-pay awards. According to Mrs. Penelope McCormack of Labor's Wage and Hour Division, the amounts of back pay awarded to employees in education are as follows:

Level	Number of employees	Amount of back pay awarded
Elementary/secondary	1,156	$1,234,335
College and university	687	1,171,017
Vocational/technical	19	3,900
TOTAL	1,862	$2,409,252

When the amount of these EPA back-pay awards for one year of cases is compared to the amount awarded over a four-year period for the 1,717 resolved Title IX cases, the Equal Pay Act is without a doubt more effective in bringing parity in coaches' salaries in cases where equal work is being performed.

RECOMMENDATIONS

The negotiated contract analysis and the study of available information suggest the following recommendations.

The National Education Association should–

- Continue to monitor all federal agencies that have responsibility for the administration of Title IX, Equal Pay Act, and Title VII of the Civil Rights Act of 1964.
- Develop, in cooperation with state and local affiliates, a data base of salary schedules on extra pay for extra work.
- Analyze negotiated contracts annually to chart the progress made on achieving parity of coaches' salaries for male and female athletic teams.
- Encourage state and local affiliates to process sex discrimination wage violations associated with equal work through Labor's Wage and Hour Division under the Equal Pay Act.
- Maintain efforts to encourage the enforcement of Title IX regulations in elementary and secondary schools and higher education.

After the initial release of this report, the National Education Association joined feminist and other organizations in charging the Secretary of Health, Education, and Welfare and the director of HEW's Office for Civil Rights with contempt of court for refusing to enforce Title IX prohibitions against sex discrimination in schools. Plaintiffs charge in the July 10, 1979, court action that the Secretary has ordered a total halt to the enforcement of Title IX in the area of intercollegiate athletics in direct violation of a court order issued in December 1977 requiring HEW to enforce all Title IX issues of the 1972 Education Amendments Act under strict timeframes.

Other national organizations bringing the original lawsuit and now asking for a contempt of court citation are the Women's Equity Action League, National Organization for Women, National Student Association, Federation of Organizations for Professional Women, and Association for Women in Science.

BIBLIOGRAPHY

Blaufarb, Marjorie. *Complying with Title IX of the Education Amendments of 1972 in Physical Education and High School Sports Programs.* Washington, D.C.: American Alliance for Health, Physical Education, Recreation, and Dance, 1976.

ERIC Clearinghouse on Teacher Education. *Women's Athletics, Bibliographies on Educational Topics No. 2.* Washington, D.C.: ERIC Clearinghouse on Teacher Education, 1976.

Gappa, Judith M., and Vehling, Barbara S. *Women in Academe: Steps to Greater Equality.* AAHE-ERIC/Higher Education Research Report No. 1, 1979. Washington, D.C.: American Association for Higher Education, 1979.

Matthews, Martha, and McCune, Shirley. *Title IX Grievance Procedures: An Introductory Manual.* U.S. Department of Health, Education, and Welfare, Office of Education. Washington, D.C.: Government Printing Office, 1976.

McCune, Shirley, and Matthews, Martha. *Programs for Educational Equity: Schools and Affirmative Action.* U.S. Department of Health, Education, and Welfare, Office of Education. Washington, D.C.: Government Printing Office, 1975.

National Education Association. *NEA Handbook, 1978-79.* Washington, D.C.: the Association, 1978.

Project on Equal Education Rights. *Stalled at the Start.* Washington, D.C.: NOW Legal Defense and Education Fund, 1978.

U.S. Department of Health, Education, and Welfare, Office for Civil Rights. *Federal Register: Title IX and Intercollegiate Athletics.* Vol. 43, No. 238. December 11, 1978.

U.S. Department of Health, Education, and Welfare, Office for Civil Rights. *Federal Register: Title IX and Intercollegiate Athletics.* Vol. 43, No. 238. December 11, 1978.

Appendix A

ORGANIZATIONAL REVIEW

Professional Organization Activity

Little exists that can be reliably used to document the status of equal pay for coaching, and even less on the expenditures for athletic programs. A bibliography of the more important studies and references appears on the opposite page. Most of the important information from these studies has been incorporated in various sections of this report.

The professional organizations, study groups, and projects contacted for information included the following:

General Title IX

National Organization for Women

Women's Equity Action League

Project on Equal Education Rights of NOW's Legal Defense and Education Fund

Resource Center on Sex Equity, Council of Chief State School Officers

Physical Education and Athletics

American Alliance for Health, Physical Education, Recreation, and Dance

Association for American Colleges: Project on the Status and Education of Women

American Council on Education

Association for Intercollegiate Athletics for Women

Council of City Directors of Physical Education

Council of County Directors of Physical Education

National Association for Intercollegiate Athletics

National Association of Girls and Women in Sports

National Association of High School Athletic Directors

National Collegiate Athletic Association

National Federation of State High School Athletic Associations

Society for State Directors of Physical Education

SPRINT, WEAL Fund

As helpful as most of these sources appeared to be, the results of this investigation produced little valid data or information on the issue of equal pay and financing of athletic programs. This organizational investigation did produce some direction and helped define the areas where data gathering was needed.

State Salary Schedule Study

Criteria for determining equal work for equal pay have many vexing aspects. They have been part of the ongoing dilemma in the Intercollegiate Policy and Employment issues. Examples of these issues are as follows:

- Should a male or female receive as much pay for devoting the same number of hours to coaching students in an intramural program as would a person who coaches a varsity football or basketball team?
- Should those who officiate in an intermural league receive less than their counterparts in a varsity sport?
- Should the same official who works an afternoon women's basketball game receive less pay than he or she would receive when officiating at an evening game played by men?

To further complicate conditions in some states, such as Iowa, certification for coaching is required. In other states, no certification for coaches is required. In some school districts, private individuals with no other employment status within the schools are hired to coach, for example, baton twirling and gymnastics. This usually occurs after regular school hours. In other instances, the teacher in a content area, such as history, during the day may coach a varsity team after regular school hours. All of this raises the issue of how best to categorize extra pay for extra work.

In September 1978 NEA Research surveyed the state education associations to determine the extent of the extra-pay-for-extra-work documentation at the state level. The three basic questions asked were as follows:

- Does the state collect extra-pay-for-extra-work information by sex in athletics?
- Does the state analyze and publish extra-pay-for-extra-work information?
- Does the state collect criteria for determining coaching salary decisions with regard to sex?

Nineteen states responded to the survey. Twelve collected extra-pay-for-extra-work information by sex in athletics, and five states analyzed and published the information. Only Colorado, Indiana, New Jersey, Ohio, and Washington have established criteria for determining coaches' salaries.

Since standardized salary schedule data were needed from the states to determine the status of equal pay and propose criteria, further work on this aspect of the project has been postponed until there are sufficient data at the state level to conduct a valid study of coaching salaries.

Teacher Opinion Polls, 1975-76 and 1978-79

When educational issues of importance rise to public prominence, NEA Research makes every effort to document the opinions of a random sample of the nation's 2.2 million teachers. In the Nationwide Teacher Opinion Poll of 1975-76, NEA solicited responses from 1,773 teachers. Of these, 1,436, or 81 percent returned valid questionnaires.

NEA plans to solicit teachers' opinions on the same issues, together with additional factors for investigation, in 1979-80. In this way some comparisons for determining progress related to Title IX might be established.

Public school athletic programs for girls. One question posed in the 1975-76 opinion poll was as follows:

- Greater emphasis on public school athletic programs for girls is a trend in the country today. Are the following practices generally followed in your school system today?

The detailed results—analyzed by total number of respondents and by four regions: Northeast, Southeast, Middle, and West—appear at the end of this Appendix. Over two-thirds (70.1 percent) of the respondents work in a school system where "girls' athletic teams have an interscholastic program." (This does not necessarily mean that 70.1 percent of the school systems have such a program.) Furthermore, teachers in the Northeast and Middle regions are more likely to work in a school system that has such a program than are teachers in the Southeast and West regions. On the other end of the scale, only 3.7 percent of the respondents work in a school system where "girls' sports produce as much revenue as boys' sports events."

Based on the teacher opinions in 1975-76, it is safe to say that the following statements reflect what is much more likely to be happening than not, at least as seen by the teachers:

- Girls DO NOT have equal priority with boys for shared athletic facilities.
- Girls DO NOT participate in athletic activities in the same proportion as boys.
- Women coaches DO NOT receive the same pay and benefits as men coaches of the same sport.
- Girls' sports programs DO NOT receive the same emphasis as boys' sports programs.
- Officials of girls' athletic contests DO NOT get paid on the same basis as those of boys' athletic events.
- Girls are NOT LIKELY to be eligible for membership on previously all-boy varsity teams.
- There is NOT as much spectator enthusiasm for girls' athletic contests as there is for boys'.
- Girls' sports events DO NOT produce as much revenue as boys' sports events.

Furthermore, there is only a 50-50 chance that—

- Girls will be awarded varsity school letters for participation in sports.
- Sports equipment for girls will be as good as that for boys.
- The school will provide girls' uniforms for participation in sports.

Obviously, in the opinion of teachers, there is sufficient evidence to indicate that Title IX compliance efforts have quite a distance to go. Yet, in some traditional areas of past discriminatory practices, it appears to teachers as though progress is being made.

Evidence provided by the opinions of teachers across the nation has, over time, been unusually accurate when compared with other kinds of evidence later compiled to describe similar conditions. It does provide insight into the situation as viewed by teachers, who are closest to the scene of the action.

Discrimination against teachers and students. In the 1978-79 Teacher Opinion Poll two questions were asked about discrimination in certain areas against male and female students and teachers. Out of the 2,305 surveys mailed, 1,930 responses were received, which equals an 83.7-percent response rate. Of the 1,930 responses, 1,777 were analyzed (the remainder were invalid for various reasons). There is a maximum error of 5 percent at the 90-percent confidence level. The data for the two questions are summarized by opinions of total respondents and by the teaching levels of respondents. These data represent only the opinions of teachers and must be treated as such. Although discrimination in any area may not be an absolute fact, when a significant number of teachers see it as such, that in itself is a reality.

QUESTION:

- Do you feel male or female TEACHERS are discriminated against in the following areas in your school system?

Answers to the above question indicate that the two areas of major concern are discrimination against female teachers in promotion/employment in "supervisory" and "administrative" positions with lesser (but significant) concern about "assignment to compensated extra duties" and "pay for comparable extra duties" being discriminative against female teachers. There was more concern at the secondary levels about discrimination against female teachers in "pay for comparable extra duties."

QUESTION:

- Do you feel male or female STUDENTS are discriminated against in any of the following areas?

Answers to the above question indicate significant concern about female students' being discriminated against in "extracurricular sports" and a lesser (but important) concern about "physical education."

Although male teachers are more likely than female teachers to see male teachers discriminated against and female teachers are more likely to see female teachers discriminated against, both are more likely to see female teachers discriminated against in "promotion/employment in supervisory/administrative positions," "assignment to compensated extra duties," and "pay for comparable extra duties."

Neither male nor female teachers see any significant discrimination against male students, with the possible exception that a few see disciplinary policies possibly discriminating against male students more than female students. Although

both male and female teachers are more likely to see some discrimination against female students, particularly in "extracurricular sports" and "physical education," female teachers tend to see discrimination against female students more often than do male teachers.

Summary. A greater percentage of female teachers than male teachers believe there is discrimination in SOME programs and practices of school systems. Discrimination is also more likely to be seen against female teachers or students than against male teachers or students.

If teachers were to identify discrimination against either MALE OR FEMALE TEACHERS in school systems, it would likely be in the following areas.

- Promotion/employment in supervisory/administrative positions for female teachers.
- Assignment and pay for comparable extra duties for female teachers.

In addition, if teachers were to identify discrimination against either male or female students, it would likely be in extracurricular sports and, possibly, in physical education against female students.

Selected data from NEA's 1975-76 and 1978-79 Nationwide Teacher Opinion Polls appear on pages 34 and 35.

SELECTED DATA FROM THE NEA's 1975-76 NATIONWIDE TEACHER OPINION POLL

QUESTION: Greater emphasis on public school athletic programs for girls is a trend in the country today. Are the following practices generally followed in your school system?

RESULTS (based on 1,436 respondents):

	Total	North-east	South-east	Middle	West
• Girls' athletic teams have an interscholastic program	70.1	73.5	61.7	77.9	66.1
• Showers, locker rooms, etc., are equal for boys and girls	65.6	66.1	63.2	70.0	62.4
• Athletic facilities (play areas) are equal for girls and boys	60.2	57.3	66.4	58.5	59.3
• School provides girls' uniforms for participation in sports events	52.7	51.0	54.1	58.0	47.3
• Girls are awarded varsity school letters for participation in sports	49.6	50.3	47.2	54.5	45.8
• Sports equipment for girls is as good as that for boys	46.9	40.3	48.3	50.1	47.3
• Girls have equal priority with boys for shared school athletic facilities	38.3	32.1	41.8	37.9	40.6
• Girls participate in athletic activities in as large a proportion as boys	30.1	28.6	32.3	32.7	26.7
• Women coaches receive the same pay and other benefits as men coaches of the same sport	26.7	27.2	21.2	25.9	31.8
• Girls' sports program receives the same emphasis as boys' sports program	23.0	19.2	27.5	21.7	23.5
• Officials of girls' athletic contests are paid on the same basis as those of boys' athletic events	21.1	15.6	23.8	19.9	24.7
• Girls are eligible for membership on previously all-boy varsity teams	20.4	28.9	14.8	17.0	21.9
• There is as much spectator enthusiasm for girls' athletic contests as there is for boys'	13.8	8.8	23.0	11.0	13.2
• Girls' sports events produce as much revenue as boys' sports events	3.7	2.0	7.5	2.4	3.2

SELECTED DATA FROM THE NEA's 1978-79 NATIONWIDE TEACHER OPINION POLL

QUESTION: Do you feel male or female TEACHERS are discriminated against in the following areas in your school system?

	Percentage saying discriminated against							
	Total		Elementary		Middle/Junior		Senior	
	Male	Female	Male	Female	Male	Female	Male	Female
A. Written policies of systems	4%	11%	4%	12%	2%	9%	6%	12%
B. Collective bargaining contract	5	10	5	10	6	9	7	11
C. Initial employment	8	17	7	15	9	19	11	19
D. Class or grade assignment	15	19	18	20	15	19	11	19
E. Promotion/employment in supervisory position	8	44	7	44	9	45	8	40
F. Promotion/employment in administration	7	51	6	50	7	52	8	50
G. Assignment of compensated extra duties	9	26	6	26	12	28	11	26
H. Pay for comparable extra duties	6	27	5	23	8	30	9	32
I. In-service education opportunities	3	5	2	4	5	6	4	5
J. Leave benefits	12	11	12	13	12	10	11	10
K. Health benefits	4	8	3	8	4	8	5	8
L. Fringe benefits for dependents	4	6	3	5	4	7	6	7
M. Retirement benefits	2	4	2	4	2	4	4	4

QUESTION: Do you feel male or female STUDENTS are discriminated against in any of the following areas?

	Percentage saying discriminated against							
	Total		Elementary		Middle/Junior		Senior	
	Male	Female	Male	Female	Male	Female	Male	Female
A. School system/school policies	5	7	4	7	6	7	5	8
B. Subject/course	5	8	4	7	5	8	5	8
C. Subject/course enrollments	6	10	5	10	6	9	8	11
D. Counseling for course selection	7	12	6	11	8	11	10	14
E. Counseling for career choices	8	15	6	15	9	15	10	17
F. Textbooks/instructional materials	4	9	4	10	3	9	4	10
G. Physical education	5	20	4	22	6	18	6	20
H. Extracurricular sports	5	38	4	37	6	39	6	38
I. Other extracurricular activities	4	12	3	13	6	12	5	11
J. Health services/insurance	1	2	1	2	2	3	2	2
K. Dress codes	4	6	4	7	6	5	4	4
L. Discipline policies	13	6	11	4	16	9	14	7
M. Academic honors and awards	3	4	2	4	4	4	2	4

HOW MALE AND FEMALE TEACHERS DIFFER IN THEIR OPINIONS ABOUT DISCRIMINATION AGAINST TEACHERS (MALE OR FEMALE) AND AGAINST STUDENTS (MALE OR FEMALE).

For Teachers	Discrimination against males		Discrimination against females	
	Opinions		Opinions	
	Male	Female	Male	Female
A. Written policies of school system	6%	3%	7%	13%
B. Collective bargaining agreement	6	5	8	11
C. Initial employment	11	6	13	19
D. Class or grade assignment	18	13	13	22
E. Promotion/employment in supervisory position	13	5	30	51
F. Promotion/employment in administration	11	5	38	58
G. Assignment of compensated extra duties	13	7	15	32
H. Pay for comparable extra duties	9	5	19	31
I. In-service education experiences	4	2	4	5
J. Leave benefits	17	9	9	12
K. Health benefits	6	2	6	9
L. Fringe benefits for dependents	5	3	5	6
M. Retirement benefits	4	2	4	4
N. Salary	6	4	6	11

For Students	Discrimination against males		Discrimination against females	
	Opinions		Opinions	
	Male	Female	Male	Female
A. School system/school policies	6%	5%	7%	8%
B. Subject/course descriptions	5	4	7	8
C. Subject/course enrollments	6	6	8	11
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Appendix B

SEX DISCRIMINATION IN COACHING

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Introduction

This memorandum considers sex discrimination in coaching and, more particularly, legal theories with which to challenge the payment of a lower stipend to the teacher-coaches of girls' athletics (both male and female) than to the teacher-coaches of comparable boys' sports. The memorandum was originally written in response to cases in which female plaintiffs were met with the defense that since both male and female coaches of girls' sports were receiving the same stipend to coach girls' sports, if the school district was guilty of any sex discrimination, it was discrimination based upon the sex of the female athletes and not upon the sex of their female coaches. The defendant school districts argued that they therefore could not be liable for sex discrimination against the female coaches and that the coaches had no standing to raise the issue of sex discrimination against their students.

An examination of a school district's extracurricular and coaching positions may indeed involve questions of discrimination among coaches, between coaches and other teachers who supervise extracurricular activities, and between the groups and sexes of students coached.[1] Although a challenge to a school system's payment of lower wages to female coaches can thus provide an opportunity to review that district's policy toward all extracurricular activities, this memorandum will focus solely on legal theories with which to challenge sexually disparate coaching salaries under relevant federal legislation.[2]

Title IX

Title IX of the Education Amendments Act of 1972, 20 U.S.C. §1681 *et. seq.*, which prohibits discrimination on the basis of sex in any educational program receiving federal financial assistance, provides a possible basis upon which to challenge disparate coaching salaries as constituting discrimination against both female coaches and their female students.[3] However, although the Supreme Court has held that a private right of action may be maintained under Title IX, *Cannon v. University of Chicago*, 441 U.S. ___ (1979), two separate courts of appeals have refused to interpret Title IX to prohibit sex discrimination in employment. *Junior College District of St. Louis v. Califano*, 597 F.2d 119 (8th Cir. 1979); *Isleboro School Committee v. Califano*, 593 F.2d 424 (1st Cir. 1979). *But cf. Piasick v. Cleveland Museum of Art*, 426 F. Supp. 779 (N.D. Ohio 1976).

A court's failure to enforce HEW's Title IX employment discrimination regulations might be circumvented by convincing female students and their parents to themselves challenge sexually discriminatory coaching practices. Although it may be difficult to actually prove that girls are not receiving equal athletic opportunities solely because their coaches receive less compensation than

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NOTE: This paper, originally presented at a November 1978 conference of the National Association of Teacher Attorneys, has been updated as of June 1979 to reflect the current state of the law.

the counterpart coaches of boys' sports, such proof should not be impossible. 45 C.F.R. § 86.41(c) provides that:

> [I]n determining whether equal opportunities are available the Director will consider, among other factors: . . .
>
> (v) Opportunity to receive coaching and academic tutoring;
>
> (vi) Assignment and compensation of coaches and tutors; . . .

Thus even if boys' and girls' athletics are comparable in all other respects (and the regulation just quoted considers 10 separate aspects of comparability), an argument can be made that the girls have been denied equal athletic opportunities because of the lower rate of pay for their coaches.

The courts have recognized the manner in which racial discrimination against teachers infects and discriminates against the students within a school system, see, *e.g., United States v. Jefferson County Board of Education*, 372 F.2d 836, 883-86 (5th Cir. 1966), *aff'd*, 380 F.2d 385 (5th Cir.) (*en banc*), *cert. denied*, 389 U.S. 840 (1967), and a similar theory can be advanced in regard to sex discrimination. If it can be shown that specific teachers (male or female) have declined to coach girls' sports or have chosen to coach boys' instead of girls' sports because of the salary schedule, an even clearer impact upon students and denial of their "opportunity to receive coaching" and equal athletic opportunities can be proven. The HEW regulations themselves provide, however, that "unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams . . . will not constitute noncompliance with this section," 45 C.F.R. § 86.41(c), and at least some HEW officials have refused to institute Department action when the only discrimination against female athletes which can be shown is disparate coaching salaries.

Students' rights to equal athletic opportunities may be asserted not only by students and their parents, but teachers can also argue that they should be afforded *jus tertii* standing to assert the rights of their students as to any coaching salary differentials. The students could have no more interest in securing equal pay for their teachers than the teachers themselves, and the fact that most students are minors makes their own ability to assert these rights more doubtful than with other plaintiffs. The teachers may therefore be the only persons with both the requisite interest and ability to vindicate these rights and the argument should thus be made that they should be granted *jus tertii* standing. *Cf. Pierce v. Society of Sisters*, 268 U.S. 510 (1925) [". . . where the owners of private schools were entitled to assert the rights of potential pupils and their parents . . ." *Griswald v. Connecticut*, 381 U.S. 479, 481 (1965)]; *Runyon v. McCrary*, 427 U.S. 160, 175 n. 13 (1976) ("It is clear that the schools have standing to assert these arguments on behalf of their patrons.")[4]

In addition to the above problems with standing to assert sex discrimination against female students and the actual proof of such discrimination, there is also a question whether the assertion of a claim on behalf of female students, either by the students themselves or by their teachers, might result in only prospective relief (correction of the salary scale and other inequities) without the award of back pay or damages for the teachers involved. Despite the existence of these problems, it still seems worthwhile to include an allegation of violations of both students' and teachers' Title IX rights as counts in a complaint challenging discriminatory coaching salaries. Even if the court eventually finds that it has no jurisdiction to entertain a Title IX claim brought on behalf of teachers or their

students, such a count might at least arouse public support for girls' coaches, which would not otherwise develop if the issue of salary discrimination is perceived as merely a controversy between the school administration and the teachers that does not directly implicate the interests of the female students themselves.[5]

Title VII

Although a court may conclude that only students, and not teachers, have a cause of action under Title IX, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et. seq.*, does cover a teacher's employment status and therefore should be relied upon by teachers challenging discriminatory coaching salaries. Despite the attractiveness of Title VII to the teacher-plaintiff, however, it is under this law that the employment of males as coaches of girls' sports has received some judicial acceptance as a defense to sex discrimination charges brought by female coaches of girls' sports. See *Kenneweg v. Hampton Township School District*, 438 F. Supp. 575 (W.D. Pa. 1977); *Jackson v. Armstrong School District*, 430 F. Supp. 1050 (W.D. Pa. 1977). See also *State Division of Human Rights v. Syracuse City Teachers Association*, 66 A.D. 2d 56, 412 N.Y.S. 2d 711 (1979).

In the *Kenneweg* and *Jackson* cases, in which both males and females coached the girls' athletic teams, two different federal judges from the Western District of Pennsylvania concluded that Title VII was inapplicable to alleged sex discrimination based upon the sex of the students coached (rather than upon the sex of the coaches themselves):

> It is clear from the statute [Title VII] that the sex of the plaintiffs must be the basis of the discriminatory conduct. As Judge John L. Miller of this court held in a case with almost identical facts, disparity in treatment not based on plaintiffs' sex is not a valid claim under Title VII. *Jackson and Pollick v. Armstrong School District*, 430 F. Supp. 1050 (W.D. Pa. 1977). If plaintiffs coaching female sports are being paid less than individuals coaching male sports, there is no valid claim of gender based discrimination as to these plaintiffs. Here plaintiffs are not being discriminated against because of *their* sex.

Kenneweg v. Hampton Township School District, supra, at 577.

It should initially be noted that both *Kenneweg* and *Armstrong* were solely Title VII cases and therefore, even if accepted as valid interpretations of Title VII, they do not foreclose a contrary result under the different language of Title IX, the Equal Pay Act, or the U.S. Constitution. Title VII of the Civil Rights Act of 1964 makes it unlawful ". . . to discriminate against any individual . . . because of *such individual's* . . . sex." 42 U.S.C. §2000e-2(a) (1) [emphasis added]. The language of Title IX is broader, however, providing that "No person . . . shall, on the basis of sex, . . . be subjected to discrimination under any education program or activity receiving federal financial assistance . . . ." 20 U.S.C. §1681(a). If otherwise applicable, Title IX is therefore not by its terms restricted to the prohibition of discrimination on the basis of the discriminatee's sex.[6] The Equal Pay Act's prohibition against discrimination "between employees on the basis of sex," on the other hand, focuses on job comparability; and, as will be argued *infra* in this memorandum, women coaches should receive equal pay for substantially equal coaching responsibilities whether or not some men also receive less for their coaching.

The results in *Kenneweg* and *Jackson* can also be challenged under Title VII. It does not appear from these opinions that the plaintiffs in either case attempted to introduce evidence either that women had traditionally coached girls' athletics or that women coached only or primarily girls' athletics. Judgment was instead granted for the defendants on a motion to dismiss in one case and on a motion for summary judgment in the other.

In contrast to the handling of *Kenneweg* and *Jackson*, in some cases it may be possible to show an historic practice of sex discrimination in coaching. Even if the school system has no women teachers qualified to coach the boys' major contact sports, such as football and basketball, men may have been preferred over some qualified women to coach boys' teams in noncontact sports, such as golf, tennis, track, or swimming. To relegate women to coaching only girls' sports and to then pay them less for their efforts would certainly violate Title VII.

Even if women have not been or are not now being unlawfully excluded from coaching boys' sports, it is likely that the majority of boys' coaches will be male and the majority (or at least a significant minority) of the girls' coaches will be female; assume, for instance, that 9 of the 10 boys' coaches at a particular school are male, while 3 of the 5 girls' coaches are female. In such a hypothetical situation the lower rate of pay for the girls' coaches will have a disparate impact on the women coaches, since 60 percent of the lower-paid coaches are women while the higher-paid class of coaches is 90 percent male. Considering all of the coaches together, 75 percent of the female coaches are in the less-well-paid group, while only 18 percent of the male coaches are at this lower-paid rank. Even if the school may be able to justify the fact that males predominately coach boys' athletics, since the boys' and girls' coaching jobs have been assumed to be equal in all respects it seems unlikely the school will be able to justify the salary differentials between boys' and girls' sports. The mere desire to spend less on girls' than boys' athletics should be unacceptable under Title IX, and it is unlikely that a school could rebut such a *prima facie* showing of disparate impact by proof of legitimate job-relatedness or business necessity.

Such an approach has been adopted in several Title VII cases. Thus, in finding that the seniority transfer rules of two employee units (one of which was over 60 percent female, the other 100 percent male) violated Title VII's prohibition against sex discrimination, one federal district judge concluded:

> It is not necessary to show that the complained-of practice adversely affects only females in order to demonstrate a violation of Title VII. A practice or procedure that has mixed effects may be presumptively violative of Title VII when the benefits or detriments of the practice bear a significant correlation to race or sex.

Wells v. Frontier Airlines, 381 F. Supp. 818, 821 (N.D. Texas 1974). Another federal district judge had reached the same conclusion in an earlier Title VII race discrimination case:

> When is a procedure racially discriminatory? Only when the impact falls solely on black employees? Only when the beneficiaries of the practice are solely white employees? If affirmative answers were to be given, very few, if any, of the plaintiffs' claims could be sustained. This court concludes, to the contrary, that a practice or procedure which has mixed racial effects may nevertheless be presumptively violative of Title VII where the benefits or detriments therefrom bear a significant correlation to race.

United States v. United States Steel Corporation, 371 F. Supp. 1045, 1054 (1973), *vacated and remanded on other grounds*, 520 F.2d 1043 (5th Cir.), *cert. denied*, 429 U.S. 816 (1976). See also *Stamps v. Detroit Edison Co.*, 365 F. Supp. 87, 116 (E.D. Mich. 1973), *aff'd in part, rev'd in part on other grounds*, 515 F.2d 301 (6th Cir. 1975), *vacated on other grounds*, 431 U.S. 951 (1977). *Cf. Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971).

Therefore, by actually putting on proof as to the disparate impact under Title VII that coaching salary differentials have upon women coaches, results such as those in the *Kenneweg* and *Jackson* cases will hopefully be avoided. *Cf. Providence School Committee and Providence AFT Local 958*, AAA Case No. 1139-0726-74 (award of Dec. 6, 1974), No. 594 Gov. Emp. Rel. Rpt. B-11 (Feb. 24, 1975). (The contention that differential boys'/girls' coaching rates were not discriminatory since males and females could coach either sport was apparently rejected because, in practice, only males coached boys' sports and only females coached girls' sports.)[7]

The Equal Pay Act

Section 1 of the Equal Pay Act of 1963, 29 U.S.C. §206(d) (1) prohibits discrimination:

> . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . . .

In determining the applicability of the Equal Pay Act, the focus is upon the jobs occupied by the relevant male and female employees. The mere comparability of these jobs is not sufficient to bring the Equal Pay Act into play (although Title VII and Title IX may apply in such cases); the jobs must instead be shown to be "substantially the same." *Angelo v. Bacharach Instrument Company*, 555 F.2d 1165 (3d Cir. 1977).

The regulations promulgated under the EPA provide specific examples and guidance on the determination of job equality under the Act (29 C.F.R. §§800.119-800.151). The interpretation of equal skill, effort, responsibility, and working conditions that these regulations set forth builds upon the U.S. Labor Department's more general conclusions that although jobs must be substantially equal for the EPA provisions to apply, such jobs "are usually not identical in every respect" and that "Congress did not intend that inconsequential differences in job content would be a valid excuse" for sex discrimination (29 C.F.R. §800.120). Furthermore, "[a]pplication of the equal pay standard is not dependent on job classifications or titles but depends rather on actual job requirements and performance" (29 C.F.R. §800.121).

In adjudging a local school district in violation of the Equal Pay Act, one federal district court has found the job of girls' softball coach to be substantially equal to that of boys' baseball coach [*Brennan v. Woodbridge School District*, 8 EPD ¶9640 (D. Del. 1974)]. In comparing the two positions, the court considered the nature of the games, the number of players supervised, the lengths of practices and playing seasons, the amount of travel required with the team, and

other responsibilities of the coaching job.[8] While it should not be difficult to show comparability between such sports as softball and baseball and girls' and boys' basketball, a more difficult problem may be presented where a girls' or boys' team does not have a direct counterpart team for the opposite sex of students. A case in which such an issue has been raised is *Eastwood v. Abbotsford Public Schools* (Wisconsin Labor and Industry Review Commission, ERD Case #7500440), in which Priscilla Ruth MacDougall of the Wisconsin Education Association Council presented expert testimony before a state hearing examiner as to the comparability of the games, and the coaching, of volleyball and basketball. The case is now pending before the Wisconsin Labor and Industry Review Commission.[9]

Once the plaintiff establishes that particular jobs are substantially equal within the terms of the Equal Pay Act, once she "show[s] that the employer pays workers of one sex more than workers of the opposite sex for equal work" [*Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974)], the burden shifts to the employer to prove that the salary differential is justified by one of the Act's four exceptions. Those four exceptions are for ". . . payment made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. . . ." 29 U.S.C. §206(k) (1). It is this last exception, which legitimates "differential[s] based on any other factor other than sex," upon which school districts will attempt to rely in defending against challenges to sexually discriminatory coaching salaries.[10]

Such a defense would seek to establish that women coaches of girls' sports are being paid less than male coaches of boys' sports because of their students' sex rather than because of their own sex and that the rationale of the *Kenneweg* and *Jackson* cases, discussed *supra*, is therefore applicable. Regardless of Title VII's focus upon discrimination on the basis of an employee's sex, though, salary discrimination based upon the sex of students coached is by its very terms not "based on any other factor other than sex," as the EPA defense provides. It would be anomalous for a court to accept as a defense to one antidiscrimination law (the EPA) school board policies which very likely could constitute a violation of another federal antidiscrimination statute (Title IX).

Local school boards may nevertheless attempt to argue that the EPA was not meant to cover a case in which both male and female coaches of girls' sports are being paid less than the coaches of boys' sports and that the "factor other than sex" defense therefore applies. Such an argument would attempt to focus not on individual instances of sexually discriminatory coaching salary disparities, but would instead expand the EPA inquiry to consider all substantially equal coaching jobs. The fact that an employer is not discriminating against all women or that some men are also being paid less than other men is, however, irrelevant to the question of whether an individual woman coach is being paid less than a comparable male coach.

Another argument that can be made in opposition to such a school board defense is that all, or almost all, female coaches are being paid less than (most) male coaches and that the underpayment at a "female's rate" of a few male coaches cannot give legitimacy to the discriminatory rate paid female coaches. The argument would be based upon the rationale of the *Wells* and *United States Steel* cases, *supra*, and would be that "[i]t is not necessary to show that the complained of practice adversely affects only females in order to demonstrate a violation of [the Equal Pay Act]." Many of the girls' coaches in a particular

school system can be expected to be women; and most, if not all, of the boys' coaches will be men. The U.S. Labor Department's regulations under the Equal Pay Act provide that–

> . . . situations will be carefully scrutinized where employees of only one sex are concentrated in the lower grades of the wage scale, and where there does not appear to be any material relationship other than sex between the lower wage rates paid to such employees and the higher rates paid to employees of the opposite sex.

29 C.F.R. §800.115. See also *Brennan v. Sears, Roebuck and Company* 410 F. Supp. 84, 98-101 (N.D. Iowa 1976) (dictum) [placement of "women-oriented" jobs in a lower pay grade than "male-oriented" jobs may constitute a violation of the Equal Pay Act].

To allow the lower rate of pay for male girls' coaches to provide a defense for the underpayment of female girls' coaches would run contrary to the spirit of the proviso to the Equal Pay Act that "an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee" [29 U.S.C. §206(d) (1)]. "'The objective of equal pay legislation . . . is not to drag down men workers to the wage level of women, but to raise women to the levels enjoyed by men in cases where discrimination is still practiced.'" *Corning Glass Works v. Brennan*, 417 U.S. 188, 207 (1974), quoting Representative Dwyer's comments on the Equal Pay Act.

In *Corning* itself, the Supreme Court held that an employer remained in violation of the Equal Pay Act even after women began to fill positions on the higher-paid and formerly all-male night shift. The Court concluded that–

> If, as the Secretary proved, the work performed by women on the day shift was equal to that performed by men on the night shift,the company became obligated to pay the women the same base wage as their male counterparts on the effective date of the Act. To permit the company to escape that obligation by agreeing to allow some women to work on the night shift at a higher rate of pay as vacancies occurred would frustrate, not serve, Congress' ends.

Corning Glass Works v. Brennan, supra at 208-209. See also *Hodgson v. Miller Brewing Company*, 457 F.2d 221 (7th Cir. 1972) ["It is irrelevant that the male technicians in the Analytical Lab are now also receiving the lower wage or that the jobs in the MQC Lab are now open to women at the higher rate, since we have found those circumstances to be part of a plan to circumvent the Act's requirement that the wages of the women in the Analytical Lab be raised." 457 F.2d at 227]; *Hodgson v. Square D Co.*, 3 EPD ¶8016 (D. Ky.), *aff'd in part, rev'd on other grounds in part*, 459 F.2d 809 (6th Cir.), *cert. denied*, 409 U.S. 967 (1972) ["If two jobs are equal in all respects, except for a wage disparity, the ability of both sexes to occupy those positions does not satisfy the Act." 3 EPD ¶8016 at 6037].

Although both the Equal Pay Act's proviso against lowering wages and the above cases deal with the remedy for violations of the Act, even in the absence of a history of male/female coaching discrimination, the purpose of the Equal Pay Act would be defeated if a school district could immunize its lower rate for female coaches by hiring or transferring a few males to coach girls' sports at the same lower rate. Employers cannot evade their duties to all women employees by treating a few males or females differently from the rest of their sex; the Fifth

Circuit Court of Appeals has thus found a violation of the Equal Pay Act despite the fact that some of an employer's female employees were being paid more than comparable male employees (with less seniority than the females):

> This [the reasoning of the district court, which had found no violation of the Act], it is contended would cripple the administration of the Act by offering an easy method of evasion. The mere presence of a few women in the upper part of the wage scale would permit widespread discrimination against women as a group. This could result automatically through general periodical increments added to a discriminatory starting salary, or deliberately through the selection of a few women for favorable treatment—the result of which would be to give protective coloration to a generally discriminatory pattern. It is enough to say that we agree.

Hodgson v. American Bank of Commerce, 447 F.2d 416, 421 (5th Cir. 1971).

An analogy can perhaps also be drawn to the Department of Labor's position on the removal of employees of one sex from a job so as to leave only employees of the other sex performing that particular job: "If a prohibited sex-based wage differential had been established or maintained in violation of the Act when the same job was being performed by employees of both sexes, the employer's obligation to pay the higher rate for the job cannot be avoided or evaded by the device of confining the job to members of the lower paid sex." [29 C.F.R. §800.114(c)]

The Equal Pay Act should therefore provide one of the best possibilities for remedying sexually discriminatory coaching salaries.

Constitutional Law

In addition to the statutory possibilities for teacher redress set forth above, an argument can be made that a coaching pay differential based upon the sex of the students coached is so arbitrary as to violate the teacher's rights to equal protection and substantive due process. Such a constitutional theory may, in fact, provide the best legal theory with which to argue for the leveling-up of the salaries of male coaches of girls' sports, especially where no females coach boys' sports. It seems irrational as a matter of common sense to pay teachers differently based upon the sex of their students for jobs that in all other respects are identical; consider, for example, the hypothetical payment of different salaries to teachers teaching at a single-sex high school or at a school containing primarily minority or foreign-born students. The school systems in the above hypotheticals might be seen as having created an unconstitutional irrebuttable presumption that the difficulty of the teacher's task varies directly with the sex or race of his or her students. *Cf., e.g., Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974); *Stanley v. Illinois,* 405 U.S. 645 (1972).

Nor can the distinction in treatment of girls' and boys' coaches be justified under the equal protection clause. Coaches' attorneys should argue that since the salary disparity involves a sexual classification, the school board must show "some ground of difference [between girls' and boys' coaches] having a fair and substantial relation" to the object of the classification, rather than merely a rational relationship between the classification of coaches and the school board objectives sought to be advanced by that classification. See, *e.g., Craig v. Boren,* 429 U.S. 190 (1976); *Reed v. Reed,* 404 U.S. 71 (1971). Even if the courts will not accept such a heightened scrutiny of coaching salary differentials, it should be possible to

prove that not even a rational relationship exists for the payment of different salaries to persons performing identical work. *Cf., e.g., Trister v. University of Mississippi,* 420 F.2d 499, 502-505 (5th Cir. 1969); *Orr v. Thorp,* 308 F. Supp. 1369, 1372 (S.D. Fla. 1969); *Alabama State Teachers Association v. Lowndes County Board of Education,* 289 F. Supp. 300, 305-306 (M.D. Ala. 1968).

As for the argument that the teachers are not being discriminated against on the basis of their sex, the U.S. Supreme Court has recognized in regard to racial classifications that "few principles of law are more firmly stitched into our constitutional fabric than the proposition that a state must not discriminate against a person because of his race or the race of his companions. . ." [*Adickes v. S. H. Kress and Company,* 398 U.S. 144, 151-152 (1970)]. See also *Dombrowski v. Dowling,* 459 F.2d 109 (7th Cir. 1972) (Stevens, J.), in which the Seventh Circuit concluded that, if proven on remand, discrimination against an attorney based upon the race of his clients would violate federal civil rights legislation. *Cf. Langford v. City of Texarkana,* 478 F.2d 262, 266-267 (8th Cir. 1973).

In *Stanton v. Stanton,* 421 U.S. 7 (1975), the Supreme Court upheld a mother's challenge to the partial discontinuation of child support upon her daughter's eighteenth birthday, where under the state's law of majority, the support would have continued until the age of 21 had the child been a male. The *Stanton* Court concluded that "in the context of child support. . .no valid distinction between male and female may be drawn." [421 U.S. at 17] The coaches of girls' sports might argue by analogy that just as parents cannot receive differing amounts of child support based upon the sex of the child supported, school athletic coaches cannot constitutionally receive differing amounts of compensation based upon the sex of the students coached. *Cf. also Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975) (dictum) ("The classification [of the Social Security Act under which widows, but not widowers, receive benefits based on the earnings of a deceased spouse] discriminates against surviving children solely on the basis of the sex of the surviving parent."); *Loving v. Virginia,* 388 U.S. 1 (1967) [in which the Supreme Court struck down Virginia's antimiscegenation law, despite the argument that the statute's racial classification applied equally to all races].

The equal protection and due process clauses of the Fourteenth Amendment thus provide theories of constitutional law that, when combined with the federal statutory claims discussed previously in this memorandum, should provide the basis for successful challenges to school coaching pay differentials.

FOOTNOTES

> [C]urrent practice indicates the following: (1) coaches for boys' sports are paid more than coaches for girls' sports, (2) school activities, predominantly coached or supervised by women, pay less than comparable activities coached by men, (3) there also appears to be evidence of discrimination in the hiring [i.e., qualified women (track, tennis, golf, etc.) instructors have been denied coaching positions for "boys" teams in those sports].
>
> Consequently, there are several problems-not single problems: (1) Equity pay for the same sports (boys/girls), (2) equality of employment opportunity for female supervisors and coaches, (3) equality of programs for girls, (4) equity pay for programs predominantly coached or supervised by women.

SOURCE: Wisconsin Education Association Council, *The Elimination of Discriminatory Policies and Practices Through the Bargaining Process,* p. 14. 1976. This WEAC pamphlet discusses means of obtaining equality among teachers in regard to their extracurricular activities through the collective bargaining process. As more and more school districts move toward the

type of master contracts advocated and discussed in this pamphlet, questions such as those discussed in this memorandum will be capable of resolution through the contract grievance process rather than through other administrative or judicial procedures.

[2]Although this memorandum discusses only federal discrimination statutes and theories, state fair employment law in the relevant state should also be investigated and utilized. As an example, consider the counterparts to federal antidiscrimination law in New Jersey. The New Jersey Law Against Discrimination, Title 10 N.J.R.S. §10:5-1, *et. seq.*, provides that it is an unlawful employment practice "for an employer, because of the. . .sex of any individual. . .to discriminate against such individual in compensation or in terms, conditions or privileges of employment. . . ." Id. at §10.5-12(a). The New Jersey analogue to the federal Equal Pay Act is found at Title 34 N.J.R.S. §§34:11-56.1 - 34: 11-57.11. Section 34:11-56.2 provides that "No employer shall discriminate in any way in the rate or method of payment of wages to any employee because of his or her sex." Finally, Article X of the Governor's Code of Fair Practices, Executive Order No. 21 (June 24, 1965), prohibits New Jersey state agencies from "provid[ing] grants, loans or other financial assistance to public agencies, private institutions or organizations which engage in discriminatory practices of an invidious nature." Although the antidiscrimination provisions must be enforced administratively in New Jersey, a New Jersey equal pay claim could perhaps be added as a pendent claim to a federal lawsuit.

[3]Even if coaching salary differentials involve sex discrimination against female students, the same pay differentials may also constitute discrimination against the girls' coaches themselves. See *Harrington v. Vandalia-Butler Board of Education*, 418 F. Supp. 603 (S.D. Ohio 1976), *rev'd on other grounds*, 585 F.2d 192 (6th Cir. 1978), *cert. denied*, 441 U.S.____(1979) ("That the plaintiff's students were the primary victims of the defendant's actions does not detract from Mrs. Harrington's right to equality in her working environment.")

[4]"Traditionally the assertion [of *jus tertii* standing] has been allowed when (1) the realtionship between the in-court claimant and the third party is of a substantial nature and (2) where the ability of the third party to assert his own rights may be impaired." Note, 10 *Akron L. Rev.* 749, 752 (1977). See also Note, 88 *Harv. L. Rev.* 423 (1974).

[5]HEW'S Office for Civil Rights is currently in the process of drafting a policy statement to coordinate HEW's handling of Title IX employment cases, and a separate policy statement on coaching salaries is also contemplated at some future date.

[6]See also the Title IX regulation which provides that "A recipient shall not make or enforce any policy or practice which, on the basis of sex: (a) Makes distinctions in rates of pay or other compensation. . . ." 45 C.F.R. §86.54(a).

[7]Proof of a sexually disparate impact under Title VII can also be used to challenge a school system's "coupling" of teaching positions to specific coaching skills and responsibilities. For instance, a school system may limit its search for English or math teachers to applicants who can also coach varsity football. This type of coupling is subject to challenge under Title VII since it should be possible to prove that inclusion of such coaching responsibilities in a job description will disqualify many more women than men from consideration for the teaching position. In the absence of proof by the school board that there is a business necessity requiring the coupling of the teaching and coaching vacancies, such coupling should be struck down as a violation of Title VII.

[8]The mere fact that one coach is coaching girls and the other coaching boys was not considered by the *Woodbridge* court and should be of no significance under the Equal Pay Act, without proof that one job requires or involves different skill, effort, responsibility, or working conditions. *Cf. Marshall v. City of Torrington*, 23 WH Cases 364 (U.S. Dist. Ct., D. Conn. 1977) [job of female matron in girls' gym and locker area substantially equal to job of male custodian in boys' gym and locker area for purposes of Equal Pay Act]; *Mize v. State Division of Human Rights*, 4 EPD ¶7762 (N.Y. App. Div. 1972), *aff'd*, 5 EPD ¶8629 (N.Y. Ct. App.), *modified on other grounds*, 6 EPD ¶8925 (N.Y. Ct. App. 1973) [position of police matron, supervising women prisoners, is same job as that of police turnkey, supervising male prisoners, and therefore female matrons are entitled to same wages as male turnkeys]. A statement by school authorities that girls' coaches are paid less solely because they coach girls may in fact constitute an admission of a Title IX violation.

[9]A defense sometimes offered in coaching cases is that coaches of sports such as boys' football are paid more than coaches of girls' teams because of the pressures associated with such a highly visible and popular sport. See *State Division of Human Rights v. Syracuse City Teachers Association, Inc.*, 66 A.D. 2d 56, 61-63, 412 N.Y.S. 2d 711, 715 (1979) (the consideration of "crowd spectator reaction pressure" in setting coaching salaries does not contravene New York Human Rights Law). To counter such an argument coaches may be obtained to testify that, to paraphrase the Fourth Circuit Court of Appeals, coaching "pressure" "is as much a function of attitude and experience" as it is of external factors; if such "pressure" does actually stem in part from external sources, it should be found to constitute merely "a peripheral part of [a coach's] employment." *Brennan v. Prince William Hospital Corp.*, 503 F.2d 282, 290 (4th Cir. 1974), *cert. denied*, 420 U.S. 972 (1975).

A variant of the pressure argument is that a school district receives much greater income (in gate receipts) from sports such as boys' football and basketball than from any girls' sports or minor boys' sports and that this greater profitability justifies higher payments to the coaches of such sports. *Cf. Hodgson v. Robert Hall Clothes, Inc.*, 473 F.2d 589 (3d Cir.) *cert. denied*, 414 U.S. 866 (1973), in which the Third Circuit upheld the payment of higher wages to male employees in the employer's men's department than to female employees in the women's department, finding the greater profitability of the men's department was a "factor other than sex" justifying the otherwise sexually discriminatory wages.

In meeting such an income defense it should be initially determined if the boys' sports in question are really profitable or if their gate receipts are in fact necessary to support the greater expense of such sports to the school district. Even if this argument is not factually supported, the *Robert Hall* decision can be distinguished on another ground:

> Pressure and spectators [and the income brought in by a sport] are often determined by other factors which may be discriminatory. As long as male sports are enhanced by the attendance of cheerleaders, bands, pep squads, the press, the school principal and the superintendent, as long as they are seen as the school's representatives in traditional rivalries and are the recipients of the major school awards, and as long as they are scheduled in prime time at the most convenient locations, girls' sports will not be their equal. Thus pressure and the number of spectators may be directly related to the unequal treatment of the two programs [or to the fact that girls' teams have only been recently added to a school athletic program].

WEAL Fund, *Some Thoughts on the Equal Pay Act and Coaching Salaries*, pp. 6-7 (1977). Furthermore, athletics have "come to be generally recognized as a fundamental ingredient of the educational process," *Kelley v. Metropolitan County Board of Education*, 293 F. Supp. 485, 493 (M.D. Tenn. 1968), and it is therefore no more appropriate for a school district to consider "profits" in setting coaching salaries than in establishing stipends for the supervision of other extracurricular activities or determining salaries for classroom teaching.

[10]If a school system can convince a court that its payments of lower salaries to girls' coaches is "based on any other factor other than sex," it will probably be found to have established a defense not only to an Equal Pay Act suit, but also to any claims under Title VII. See 42 U.S.C. §2000e-2(h) ["It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29."]

Appendix C

AN HISTORICAL REVIEW OF TITLE IX

Establishing Time Limits: 1972 to 1979

A first step in the investigation of evidence to document progress in implementing Title IX in physical education and athletics was to specify the years 1972 through 1979 as the time span for limiting the information search. Although 1972 was the first year of passage of Title IX and the implementation regulation was not published until 1975, it was decided that no possible avenues for documenting evidence of progress should be overlooked. The passage of Title IX of the Higher Education Amendments of 1972 had immediate and significant impact on at least one other major piece of legislation—the Equal Pay Act of 1963. Indeed the effects of Title IX in amending the Equal Pay Act in 1972 became critical in tracking the progress toward eliminating sex discrimination in compensation related to equal pay for equal work in coaching. This is but one illustration of the value of citing the years before the 1975 regulation as worthy of inclusion. Other advantages will also be highlighted throughout this section of the report.

Identifying Components for Possible Investigation: An Overview of the Title IX Regulation of 1975 as It Applies to Physical Education and Athletics

Major provisions of the Title IX regulation as they appeared in 1975 will be reviewed here for two important reasons. First, they offer insight into current controversies and delays related to athletics at the postsecondary and secondary levels. Second, the provisions set the stage for a clearer understanding of why emphasis was given to the employment and compensation issues related to coaching. NEA acknowledges the assistance and consultation provided by the American Alliance for Health, Physical Education, Recreation, and Dance (AAHPERD) in compiling this portion of the report.

Access to courses in physical education. Section 86.34 of the Title IX regulation of 1975 deals with the programmatic aspects of Title IX, and its provisions indicate that no institution or agency that receives federal funds will "provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including physical education . . ."

- Section 86.34 *does not prohibit* the grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

- Section 86.34 *does not prohibit* separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball, and other sports, the purpose or major activity of which involves bodily contact. (Softball and baseball are not considered to be contact sports.)
- Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards that do not have such effects.
- Portions of classes in elementary and secondary schools that deal exclusively with human sexuality may be conducted in separate sessions for boys and girls.

Applications of these provisions to the early elementary level were perceived by AAHPERD to indicate little problem because conduct of separate physical education activities for boys and girls was most uncommon at these levels.

By grades 5-8, slightly more anxiety on the part of coaches and/or teachers could be anticipated. Tendencies to provide more aggressive sports skills' teaching for boys are somewhat more in evidence at these levels. However, minimum barriers were judged to be present.

At grades 9-12 of the secondary level and the postsecondary levels, the need for changes to accommodate Title IX was anticipated to be the greatest. This would be so for a number of reasons, which follow.

Physical education has many definitions, but the National Association for Sport and Physical Education refers to it as "that integral part of total education which contributes to the development of the education of the individual through the natural medium of physical activity which is human movement." This would include exercise, games, sports activities, dance, and aquatics. Such widely varied offerings are not always available at advanced levels of education.

Title IX made no curriculum requirements, except that physical education classes should not be conducted separately on the basis of sex. Course offerings cannot be sex designated as "boys' basketball" and "girls' basketball." Courses in physical education conducted during regular school hours must be open to both sexes on an elective/selective basis. Only in the playing situation of contact sports can separation by sex be made at any level of instruction. At the more advanced levels of education, this would require changes in many institutions and school districts.

AAHPERD suggested that individual, dual, and team sports, rhythms, aquatics, combatives, conditioning, sports appreciation, and recreational carry-over skills be used as the bases for integrating course offerings. Survival skills, self-defense, and movement repertoires were also recommended.

Individualization for the purposes of evaluation according to appropriate standards that did not penalize or adversely affect one sex were also seen by AAHPERD as a preferred method for meeting Title IX standards.

At the postsecondary/higher education levels, recommendations similar to those for secondary education were deemed appropriate. One additional prohibition was noted in that designations of physical education departments by sex were declared inappropriate under the Title IX regulation.

Summary. The most extensive impact of Title IX in physical education would result from the necessity to integrate course or curriculum offerings for males and females. Also, the use of standards for evaluating performance would necessitate the application of standards that did not inappropriately discriminate against either sex. In addition to complying with the letter of the law, such changes as required by Title IX would also include other changes. They entail philosophy and attitudes toward the meaning of physical education for all people, a broadening of the curriculum or course offerings to include equal opportunity and alternatives for both sexes, and an adjustment of traditional practices that tended to accentuate the differences in sex role expectations rather than emphasizing human skill development. Most extensive implications for change were anticipated at the secondary and postsecondary levels where sex segregation in physical education was seen as the rule rather than the exception.

Athletics or competitive sports, intramurals, and interscholastics. The provisions of Section 86.41 of the Title IX regulation applying to athletics or competitive sports are among the stumbling blocks to the implementation of Title IX at the secondary and postsecondary levels. The mandates are as follows.

- GENERAL—No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club, or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.
- SEPARATE TEAMS—A recipient may operate or sponsor separate teams for members of each sex when selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, when a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have been previously limited, members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball, and other sports, the purpose or major activity of which involves bodily contact.
- EQUAL OPPORTUNITY—A recipient that operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available, the director will consider the following factors:

  —Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of both sexes. When sufficient interest for additional opportunities for sports is expressed, such requests might be viewed as evidence for offering additional alternatives that did not previously exist.
  —The provision of equipment and supplies.
  —Scheduling games and practices.
  —Travel and per diem allowance.
  —Opportunity to receive coaching and academic tutoring.
  —Assignment and compensation of coaches and tutors.
  —Provision of locker room, practice, and competitive facilities.
  —Provision of medical and training facilities and services.
  —Provision of housing and dining facilities and services.
  —Publicity.

- EXPENDITURES–Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams do not necessarily constitute noncompliance. However, in assessing equality of opportunity for members of each sex, consideration should be given to the failure to provide necessary funds for teams for one sex. Regarding financial assistance to students, Section 86.37 also requires the following:
  - Male and female students must be eligible for benefits, services, and financial aid without discrimination on the basis of sex.
  - Scholarship recipients should initially be chosen without regard to sex. Then, when the time comes to award the money, sex may be taken into consideration in matching available monies to the students chosen. Prizes, awards, and scholarships not established under a will or trust must be administered without regard to sex.
  - A recent policy interpretation from HEW's Office for Civil Rights indicating that per capita expenditures for students in postsecondary athletics will be a measure of compliance with Title IX is in dispute. This will be discussed in greater detail later.

Employment provisions. Sections 86.51 through 86.61 of the Title IX regulation specify employment provisions. Coverage is extended to all employees in all institutions, both full- and part-time, except those in military and religious schools. Employment coverage is modeled after the policies of the Equal Employment Opportunity Commission and the U.S. Department of Labor's Office of Federal Contract Compliance. Among the antidiscrimination provisions included for coverage are the following.

- Employment criteria.
- Recruitment.
- Compensation.
- Fringe benefits.
- Advertising.
- Job classifications and structures.
- Marital or parental status.
- Effect of state or local laws.
- Pre-employment inquiries.
- Sex as a *bona fide* occupational qualification.

Detailed coverage of the employment provisions is presented in *Final Title IX Regulation Implementing Education Amendments of 1972,* which is available from HEW's Office for Civil Rights, Washington, D.C.

Identifying Barriers to Progress: Proposed Regulation on Intercollegiate Athletics, 1978-79

Since its inception, the Title IX regulation relating to athletics or sports has been the subject of conflict and confusion. Memos of understanding and interpretations offered by the Office for Civil Rights have met with resistance. Ultimately, HEW published a proposed new policy interpretation in the December 11, 1978, *Federal Register* for public comment. Over 300 comments were received by the closing date of February 20, 1979.

Essentially, these proposed policy interpretations contain two parts. Part 1 declares an institution in compliance if the institution does the following:

- Immediately eliminates differences in the average amount of money spent per male and female athlete currently playing on intercollegiate teams.
- Offers comparable benefits not so easily measured by fiscal standards, such as opportunities to compete and practice, access to tutoring services, and provision of locker rooms.

A comparison of funds to determine equity for scholarships, recruiting costs, and other factors that might be measured in financial terms would also be used. Unequal spending would not necessarily be discriminatory if innate factors were demonstrated, such as the cost of equipment for a particular sport; the level of compensation on a local, regional or national basis; or particular decisions about program made by the head of the women's or men's programs. These accommodations purportedly account for discrepancies encountered by the unique size and cost of football. An expressed intent is to permit maximum institutional flexibility and minimal federal intrusion.

Part 2 addresses the necessity for colleges to establish procedures to expand and upgrade women's sports opportunities. Expanding the quantity of female players and expanding the number of sports offered at club, intramural, and intercollegiate levels will be considered. In addition, publicizing women's sports and expanding their scope from the local to the state, regional, and national levels would be considered. Those institutions that could demonstrate that they are currently satisfying the athletic interests and abilities of their women students would be exempt from the requirement to establish such procedures.

Expenditures, according to this proposed 1978 policy interpretation, call for a general standard of equalization of *per capita* funding of women's and men's sports. This is cast in the light of the previously stated recognition of the cost of maintaining a football team as compared to that of maintaining other sports.

In essence, these proposed policy interpretations mean that postsecondary institutions could not provide different services (buying uniforms for male teams but not female teams, recruitment expenditures for males but not females, different percentages of scholarships for males as opposed to those for females, different forms of transportation, etc.) unless such differentials in cost are justified as integral to the sport itself (cost of football uniforms versus hockey uniforms, equipment, etc.).

Once again this regulation is being opposed primarily by the National Collegiate Athletic Association. Allegedly, HEW is being pressured to refer these proposed policy applications for Congressional approval. Title IX advocates believe that Congressional approval of the regulation in 1975 was sufficient and that the proposed policy interpretation is an extension of that original Congressional approval of 1975. The National Collegiate Athletic Association is using the General Education Provisions Act (GEPA) to support its request for further Congressional approval.

Advocacy groups report that attempts to block the implementation of the Intercollegiate Athletics Policy of 1978 will stymie continued opportunities for the larger numbers of females (300% increase) now participating in secondary-level athletics.

Opponents of the Intercollegiate Athletics Policy interpretation also threaten to work to amend the education appropriations bills by excluding revenue-producing sports (primarily football) from coverage. Similar efforts failed in the courts and during Congressional consideration of the Education Amendments of 1974.

The final disposition of the Policy Interpretations of Title IX in Athletics (1978) is not yet known.